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The Right to Be Cold: Examining the Indigenous Peoples' Rights and Climate Change

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The Right to Be Cold: Examining the Indigenous Peoples' Rights and Climate Change

by

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ABSTRACT

The reality of climate change and its adverse implication on the human and environmental rights of the Inuit is no longer in doubt. The observed impacts of climate change in the Arctic region confirm that the change in climate has violated the fundamental human rights of the Inuit inhabiting the Arctic region, the integrity of the Arctic ecosystem, and also the environmental “right to be cold”¹. Emissions of greenhouse gases primarily due to human activities have contributed monumentally to climate change, and these emissions have, over the years, been encouraged by the actions or inactions of States. The principle that “where there is a right, there is a remedy” prompts the search for legal remedies within the international human rights system to address the impacts of climate change on the Inuit and the Arctic region.

This thesis addresses the legal and regulatory framework that can be adopted to address the impact of climate change on Northern Indigenous peoples. The question of whether current global regimes on climate change provide an effective mechanism for the Peoples of the Arctic to seek redress to defend their culture and way of life is also addressed. This thesis argues that the Inuit may find an effective mechanism to seek redress within the existing United Nations and Inter-American human rights systems.

¹ Watt-Cloutier, Sheila, *The Right to Be Cold: One Woman’s Story of Protecting Her Culture, the Arctic and the Whole Planet* (Toronto: Penguin Canada, 2015). [Watt-Cloutier 2015].

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CHAPTER ONE

1.1 Introduction

This thesis addresses the issues of climate change faced by the Canadian Inuit inhabiting the Arctic region with a view to framing a legal approach to them. It seeks to resolve the issues by examining the international law mechanisms through which the Indigenous peoples who live in the Arctic region may seek redress to defend their culture, way of life, and ecosystem.

Climate change is a global phenomenon which has now become a threat to human existence. It is inarguably one of the most notorious issues facing humanity today. According to the *United Nations Framework Convention on Climate Change* (UNFCCC)², climate change is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."³ It is now well settled that the emissions of greenhouse gases (GHGs) contribute monumentally to climate change. Carbon dioxide, methane, nitrous oxides, halocarbons and chlorofluorocarbons have been noted as greenhouse gases that contribute to climate change.⁴ In 2001, the International Panel on Climate Change (IPCC) noted that "[t]here is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities."⁵ These human activities include the "burning of fossil fuels for

² *United Nations Framework Convention on Climate Change*, 12 June 1992, 1771 UNTS 107 art 1, 31 ILM 849 (entered into force 21 March 1994) [UNFCCC].

³ *Ibid* at art. 1(2).

⁴ Professor Olanrewaju Fagbohun & Dr (Mrs.) Francisco E. Nlerum, "Implementing an Effective Regulatory Scheme for Climate Change" (2001) NIALS Journal of Environmental Law 266 at 268; See IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp, online: IPCC <www.ipcc.ch/assessment-report/ar5/> [IPCC Fifth Assessment Report]

⁵ Dr. Robert Watson et al., eds., *Climate Change 2001: Synthesis Report. A Contribution of Working Groups I, II, and III to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (New York: Cambridge University Press, 2001), online: IPCC <www.ipcc.ch/ipccreports/tar/vol4/index.php?idp=22>.

industrial use, transportation, electricity generation and land clearing, which have resulted in increased atmospheric concentrations of greenhouse gases.”⁶ In 2007, the IPCC in its fourth report revealed that the “warming of the climate system is unequivocal”⁷, and further noted that “most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations.”⁸ Furthermore, the 2014 IPCC fifth assessment report, which is its most recent report on climate change corroborates its previous views and observations in the 2001 and 2007 reports. The 2014 report further noted that “[h]uman influence on the climate system is clear, and the recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems.”⁹ The 2014 report further reinstated its observation in its 2007 report by noting that “[w]arming of the climate system is unequivocal”¹⁰, and added that “since the 1950s, many of the observed changes are unprecedented over decades to millennia.”¹¹ The report also observed that “anthropogenic greenhouse gas emissions have increased since the pre-industrial era driven largely by economic and population growth.”¹² Flowing from these three reports of IPCC and other scientific observations, there is a general agreement that the climate system is definitely changing, that human activities are mainly responsible for this change, and that anthropogenic greenhouse gas emissions are increasing by the day.

⁶ Canadian Environmental Assessment Agency, “Incorporating Climate Change Considerations in Environmental Assessment: General Guidance for Practitioners” (last modified 06 July 2016), online: CEAA <www.ceaa.gc.ca/default.asp?lang=En&n=A41F45C5-1&offset=2&toc=hide>

⁷ Synthesis Report; IPCC, *Fourth Assessment Report: Climate Change 2007*, (2007), online: IPCC <<http://www.ipcc.org>>;

⁸ *Ibid.*

⁹ Synthesis Report; IPCC, *Fourth Assessment Report: Climate Change 2014*, (2014), online: IPCC <<http://www.ipcc.org>>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

Climate change continues to attract global attention because it is a global phenomenon which “does not respect national borders.”¹³ The United Nations General Assembly in 1989 recognized climate change as a global problem.¹⁴ Changes in the climate have had, and continue to have, damaging impacts on natural systems, human systems and ecosystems across all continents and all over the world.¹⁵ The significant impacts that have been observed over the years include flooding, drought, sea level rise, heat waves, ocean acidification, catastrophic hurricanes, deforestation, shrinking and melting of the glaciers, human ill health, and extinctions of wildlife among others.¹⁶ The emissions of greenhouse gas have also caused environmental pollution, which has been responsible for several incidences of severe health conditions such as bronchitis, heat rash and asthma, among others.

One of the regions of the earth which has experienced and continues to experience the threat of climate change is the Arctic region.¹⁷ The global “warming trend has had a devastating impact on Arctic ecosystems.”¹⁸ In fact, the experience of the Canadian Inuit inhabiting the Arctic region in the hands of climate change has been particularly distressing. The Arctic region “is a unique area which is known to be the aboriginal homeland of the Inuit, Inupiat, Yupik, and several

¹³ “Climate Change Affects Everyone”, online: *United Nations* <www.un.org/sustainabledevelopment/climatechange/>.

¹⁴ *United Nations Framework Convention on Environment and Development*, 22 December 1989, U.N. Doc. A/RES/44/228; See Veronica de la Rosa Jaimes, “The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights” (2015) 45:2 Cal W Int’ LJ 218 [Veronica].

¹⁵ IPCC Fifth Assessment Report, *supra* note 3 at 49. See “The Effects of Climate Change”, online: NASA <<https://climate.nasa.gov/effects/>>; See also “The Effects of Climate Change”, online: WWF <www.wwf.org.uk/effectsofclimatechange>

¹⁶ *Ibid.*

¹⁷ “Arctic Threats”, online: *Greenpeace International* <www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/arctic-under-threat/> [Greenpeace].

¹⁸ Donald M. Goldberg & Martin Wagner, “Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System” in Velma I. Grover, ed, *Climate Change: Five Years after Kyoto* (Enfield, NH: Science 2004) 191 at 193. [Goldberg & Wagner].

other native groups”¹⁹ who “live in Alaska, northern Canada, Greenland, and Chukotka in the far east of the Russian Federation.”²⁰

Over the years, climate change has had devastating impacts on the ecosystems and the ecological features of the Arctic region.²¹ The record reveals that climate change has “melt[ed] sea ice [which] affects the population of marine mammals, caribou, polar bears, and the subsistence livelihoods of people that depend on them.”²² Furthermore, the “thawing [of] permafrost in the Arctic has damaged houses, roads, airports, and pipelines...”²³ In 2004, the Arctic Climate Impact Assessment (ACIA)²⁴ settled all discussions and uncertainties regarding the impacts of climate change in the Arctic region. According to the ACIA report, the impact of climate change has been more severe in the Arctic region than in any other part of the world.²⁵ The ACIA stated unequivocally that “climate changes are being experienced particularly in the Arctic. Arctic average temperature has risen at almost twice the rate as the rate of the world in the past few decades. Widespread melting of glaciers and sea ice and rising temperatures present additional evidence of strong Arctic warming.”²⁶ The ACIA confirmed the adverse impacts of climate change in the Arctic region and its inhabitants – the Inuit. The ACIA through several indicators of climate change such as rising temperatures, increasing precipitation, the melting sea ice, thawing permafrost, sea-level rise, melting ice sheets and glaciers, ocean salinity change, vegetation shifts, loss of hunting culture, declining food security, human health concerns among other visible

¹⁹ *Ibid.*

²⁰ “Climate Change and Human Rights”, online: *Carnegie Council for Ethics in International Affairs*, <www.carnegiecouncil.org/publications/archive/dialogue/2_11/section_1/4445>.

²¹ Goldberg & Wagner, *supra* note 18 at 193.

²² *Ibid.*

²³ *Ibid.*

²⁴ Arctic Climate Impact Assessment, *Impacts of a Warming Climate: Final Overview Report* (New York: Cambridge University Press, 2004) online: ACIA <www.acia.uaf.edu/> [ACIA Overview].

²⁵ *Ibid.*

²⁶ *Ibid* at 8.

indicators established the devastating impacts of climate change in the Arctic region. The key finding of the ACIA established the extreme vulnerability of the Arctic region to the impacts of the change in the climate.²⁷ The ACIA concluded that:

[t]he Arctic is extremely vulnerable to observed and projected climate change and its impacts. The Arctic is now experiencing some of the most rapid and severe climate change on earth. Over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social and economic changes, many of which have already begun. Changes in arctic climate will also affect the rest of the world through increased global warming and rising sea levels.²⁸

The ACIA clearly corroborated the conclusion of the 2001 report of the Intergovernmental Panel on Climate Change (IPCC) on the impacts of climate change. The IPCC concluded that “changes in climate that have already taken place are manifested in the decrease in extent and thickness of Arctic sea ice, permafrost thawing, coastal erosion, changes in ice sheets and ice shelves, and altered distribution and abundance of species in the polar regions.”²⁹ What is more, one of the key findings of the ACIA is the impact of climate change on the cultural lives, social identities and economies of the Indigenous communities.³⁰ It stated that “[m]any Indigenous Peoples depend on hunting polar bear, walrus, seals, and caribou, herding reindeer, fishing, and gathering, not only for food and to support the local economy but also as the basis for cultural and social identity.”³¹

²⁷ ACIA Overview, *supra* note 24.

²⁸ *Ibid* at 10.

²⁹ James J. McCarthy et al. eds., *Climate Change 2001: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Third Assessment Report of the IPCC* (New York: Cambridge University Press, 2001) at 16 [IPCC 2001]

³⁰ ACIA Overview, *supra* note 24 at 11.

³¹ *Ibid*.

While there exists scientific evidence to confirm the impact of climate change on the ecosystems and ecological features of the Arctic region, there is also evidence that the impact of climate change has, over time, threatened and continues to threaten the fundamental human rights of the Indigenous Peoples inhabiting the Arctic region. The human rights that are threatened include, but are not limited to the “rights to life and personal security; to use and enjoyment of property; to residence and movement; to inviolability of the home; to preservation of health; to the benefits of culture; to work and fair remuneration; to means of subsistence; and to free disposition of natural resources”³²; and since the “culture [of the peoples of the Arctic] is based on the cold, the ice and snow, ... in essence [–] the right to be cold.”³³ For the Inuit, it is the case that their human rights have been violated by climate change. The “Inuit culture is inseparable from the condition of their physical surroundings, the widespread environmental upheaval resulting from climate change violates the Inuit’s right to practice and enjoy the benefits of their culture.”³⁴

Interestingly, the United Nations Human Rights Council adopted Resolution 7/23 on Human Rights and Climate Change on 28th of March 2008.³⁵ The Human Rights Council recognized “that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights...”³⁶

³² Goldberg & Wagner, *supra* note 20 at 191-192.

³³ Sheila Watt-Cloutier, “The Inuit Right to Culture Based on Ice and Snow” in Kathleen Moore & Michael P. Nelson, eds, *Moral Ground: Ethical Action for a Planet in Peril* (Texas, Trinity University Press, 2001) 25 at 28 [Watt-Cloutier]. See Watt-Cloutier 2015, *supra* note 1.

³⁴ Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by the Acts and Omissions of the United States*, online: ICC <<http://www.inuitcircumpolar.com/index.php?Lang=En&ID=316>> [ICC Petition] at 5.

³⁵ United Nations Human Rights Council, *Resolution 7/23 on Human Rights and Climate Change*, Res. 7/23, UN Doc. A/HRC/7/78 (28 March 2008) [UNHRC 7/23].

³⁶ *Ibid.*

This resolution established the realities of the impact of climate change and its role in threatening the full realization of human rights.³⁷

Over the years, several attempts have been made to search for the legal and regulatory framework to effectively address the impacts of climate change on the Indigenous People (Inuit) and the Arctic region. These attempts have considered addressing these issues through the instrumentality and lens of international environmental law, the human rights system, and by focusing on rights-based approaches to climate change to drive the discussion on climate change litigation. For instance, for the first time, the Inuit Circumpolar Conference (ICC) in 2005 filed a petition against the United States at the Inter-American Commission on Human Rights (“Commission”) “seeking relief from violations resulting from global warming caused by the acts and omissions of the United States”³⁸ This petition did not see the light of the day as it was thrown out by the Commission, nonetheless, it set the foundation for establishing the nexus between human rights and environmental rights, and the need to adopt human rights-based approaches in addressing environmental issues.³⁹

³⁷ *Ibid.*

³⁸ ICC Petition, *supra* note 34 at i.

³⁹ See Hari M. Osofsky, “The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights” (2007) 31:2 Am Indian L Rev 675. [Osofsky]; Siobhan McInerney-Lankford, “Climate Change and Human Rights: An Introduction to Legal Issues” (2009) 33 Harv Envtl L Rev 432.

1.2 Research Questions, Claim and Objective

Given the realities of the impact of climate change in the Arctic region, and particularly, on the Inuit, and the need to protect them against the violations of their fundamental human rights and the integrity of their ecosystem, my thesis will seek to answer the following two questions:

1. What legal and regulatory framework can be adopted to address the impact of climate change on the Indigenous people?
2. Do the current global regimes on climate change provide an effective mechanism for the Peoples of the Arctic to seek redress to defend their culture and way of life?

In this thesis, I claim that the Inuit may find an effective mechanism to seek redress in the United Nations and Inter-American human rights systems. I also claim that the express recognition of the right to a healthy environment by binding international human rights treaties and regimes as against mere recognition by customary international law will address the issues of climate change in the Arctic region, and also provide an effective basis for the Inuit to seek redress to defend their culture and way of life. My overall objective is to advocate for the “right to be cold”⁴⁰, and also join the conversation on the search for the legal and regulatory framework to effectively address the impacts of climate change on the Indigenous People.

⁴⁰ Watt-Cloutier 2015, *supra* note 1.

1.3 Research Methodology: Research Methods and Classification

I adopt the doctrinal approach in this research for the examination of the international legal regimes and frameworks that recognize the human rights and the environmental rights of the Indigenous Peoples. I rely on existing literature, scholarly conversations and existing academic writings. The literature narrates, in great detail, the experiences of the Indigenous peoples who live in the Arctic and the damaging effect of global warming and climate change on their ecosystems, culture and way of life among others. My thesis is classified as normative research.

1.4 Thesis Structure

This thesis is divided into five chapters. Chapter one gives a general overview on climate change and the issues to be addressed in this thesis. It also examines the ecological and associated cultural changes experienced by the circumpolar people. This first chapter discusses the background to the research problem, states the research question, claim and objective; and also discusses the research methodology.

Chapter two addresses the fundamental human and environmental rights of the Indigenous peoples. It also reveals the nexus between the human rights and environmental rights of the Indigenous peoples. Furthermore, it focuses on the international and domestic regimes that apply to Indigenous peoples in the Arctic.

Chapter three comprehensively addresses the observed impacts of climate change on the ecosystem, culture, and way of life of the Peoples of the Arctic.

Chapter four focuses on current regimes and frameworks on climate change within the United Nations system and their significance or otherwise to the Inuit in their search for legal remedies. It will also address the dispute resolution mechanisms within these international regimes and their system of enforcement. Furthermore, it seeks to answer the question of whether or not the current global regimes on climate change provide an effective mechanism for the peoples of the Arctic to seek redress to defend their ecosystem (environment), culture, and way of life.

Chapter five interrogates relevant human rights systems – the United Nations human rights system and the regional human rights system, and the existing principles of international law that may provide necessary mechanisms to accommodate the complaints of the Inuit and also help them in seeking recourse against states for their refusal to take actions to reduce their contributions to climate change. This chapter also addresses the Inuit's case against the United States, and concludes that there are effective remedies under the UN human rights system and also under the Inter-American human rights system for the Inuit's human rights claims against the United States. Furthermore, this chapter makes recommendations on categorizing the intentional acts of any states which contribute to global warming as a crime against humanity.

CHAPTER TWO

THE FUNDAMENTAL HUMAN RIGHTS AND ENVIRONMENTAL RIGHTS OF THE INDIGENOUS PEOPLES: AN APPRAISAL

2.1 Introduction

This chapter focuses on establishing the fundamental human rights and the environmental rights of the Indigenous peoples. It also reveals the nexus between the human rights and the environmental rights of the Indigenous peoples. Moreover, it focuses on the international regimes that apply to Indigenous peoples in the Arctic. Arguably, it is impossible to properly address the issues of climate change faced in the Arctic region with a view to framing a legal approach to them without examining the fundamental human rights and the environment rights of the Indigenous peoples. Therefore, this chapter will generally appraise the human rights and the environmental rights applicable to the Indigenous peoples.

2.2 What are Human Rights?

Human rights are universal rights which are inherent to all human beings, irrespective of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴¹ Human rights are inalienable, indivisible, and interdependent.⁴² The inalienable nature of human rights underscores the fact that all human beings are entitled to these

⁴¹ *International Covenant on Civil and Political Rights*, 19 December 1996, 999 U.N.T.S. 171 at art. 2(1) (entered into force 23 March 1976) [ICCPR]; see also “Human Rights”, online: *United Nations* <www.un.org/en/sections/issues-depth/human-rights/>.

⁴² “What are Human Rights?” online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> [OHCHR]; see UNFPA, “Human Rights Principles” online: *United Nations Population Fund* <www.unfpa.org/resources/human-rights-principles>.

rights by virtue of their births and, as such, cannot be taken away from them. “Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.”⁴³ Under the international law human rights system, states are obligated to protect the rights of individuals against abuses, and are also required to ensure and facilitate the full enjoyment of these fundamental rights.⁴⁴ After the Second World War, the discussions regarding human rights emerged.⁴⁵ These discussions prompted the *Universal Declaration of Human Rights* (UDHR)⁴⁶ which was adopted by the United Nations General Assembly in 1948. This declaration, for the first time, established the universality of human rights, and set out the rights to be recognized and protected by States.⁴⁷ The UDHR has been described as “the foremost statement of the rights and freedoms of all human beings”⁴⁸, and the very foundation of modern human rights.⁴⁹ The UDHR consists of 30 articles establishing the right to life, liberty, security of person, and freedom against slavery, torture, inhuman and degrading treatment amongst others. Although the UDHR is not binding, its articles have been adopted and invoked in several international treaties, international customary laws, national constitutions and domestic laws. The UDHR laid the necessary foundation for the formulation of the International Bill of Rights. The International Bill of Human Rights consists of the *Universal Declaration of Human Rights*, the two binding United Nations’ human rights treaties,

⁴³ OHCHR, *supra* note 42.

⁴⁴ *Ibid.*

⁴⁵ Sumudu Atapattu, “The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law (2002) 16:1 Tul. Envtl. L.J. 65 at 67 [Sumudu].

⁴⁶ *Universal Declaration on Human Rights*, 10 December 1948, G.A. Res. 217 A, UNGAOR, 3d Sess., pt. I, Resolutions, at 71, UN Doc. A/810 (1948) [UDHR].

⁴⁷ “Universal Declaration of Human Rights”, online: *United Nations* < www.un.org/en/universal-declaration-human-rights/ >.

⁴⁸ “What is the Universal Declaration of Human Rights” (last updated 19 November 2018), online: *Equality and Human Rights Commission* < www.equalityhumanrights.com/en/what-are-human-rights/what-universal-declaration-human-rights >.

⁴⁹ *Ibid.*

the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁰ with its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁵¹. The ICCPR and the ICESCR were both adopted in 1966 and entered into force in 1976.

In 1977, the French jurist, Karel Vasak in an article⁵² categorized human rights into three generations. The first-generation human rights are described as civil and political rights which include the right to life, freedom of speech, and freedom of association amongst others.⁵³ These rights are captured under the ICCPR. They serve to impose a negative duty on States to protect and defend the rights of individual freedoms from being abused by the States. The second-generation rights are economic, social and cultural rights. These rights are captured under the ICESCR. They impose the obligation on States to ensure the realization and full enjoyment of these rights. The third-generation human rights are described as solidarity rights. These rights include the right to natural resources, right to culture, and right to a healthy environment among others. The third-generation rights are essential to Indigenous peoples as they reflect the significance of having a healthy environment as well as the importance of participating in their cultural heritage.

⁵⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 at art. 2(1) (entered into force 23 March 1976) [ICCPR].

⁵¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR].

⁵² Vasak, Karel. "Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" (1977) 30:11 UNESCO Courier 29 [Karel]; see also "Three Generations of Human Rights", online: *Globalization 101* <<http://www.globalization101.org/ar/three-generations-of-rights/>>.

⁵³ *Ibid.*

2.3 What are Environmental Rights?

Environmental rights are considered third generation human rights. They emerged from the need to protect the environment and natural resources. Over the years, the right to a healthy environment has gained increasing popularity, and has, arguably, received more attention than other human rights.⁵⁴ This is predicated upon the claim that the right to a healthy environment is crucial and fundamental to the realization of every other human right.⁵⁵ It is in view of this that over 110 countries⁵⁶ now recognize, in their constitutions, the right of their citizens to a healthy environment as a fundamental human right.⁵⁷ Unfortunately, Canada is yet to expressly recognize this right.⁵⁸ The UN records that “over 2 million annual deaths and billions of cases of diseases are attributed to pollution”⁵⁹ and environmental degradation. There is no universal definition of what environmental rights are, however, there is a consensus on what constitutes environmental rights. Environmental rights recognize the protection of the environment from degradation, the preservation of the natural ecosystem, the promotion of a sustainable, clean, safe, and healthy environment, and the facilitation of the right to information on environmental matters. The right to a clean environment is crucial to the indigenous peoples as their livelihoods largely depend on

⁵⁴ “What Are Environmental Rights”, online (pdf): *The Bluedot Movement* <<http://bluedot.ca/wp-content/uploads/2015/01/4>>.

⁵⁵ “All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.” – “Special Rapporteur on Human Rights and the Environment”, online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndehx.aspx>.

⁵⁶ David Boyd in “The Constitutional Right to a Healthy Environment” notes that “As of 2012, 177 of the world’s 193 UN member nations recognize this right through their constitution, environmental legislation, court decisions, or ratification of an international agreement. See David R. Boyd “The Constitutional Right to a Healthy Environment” (2012) 54:4 *Environment: Science and Policy for Sustainable Development* 3 at 4. [David Boyd].

⁵⁷ “Right to a Healthy Environment”, online: *Ecojustice* <www.ecojjustice.ca/case/right-to-a-healthy-environment/>.

⁵⁸ *Ibid.*; The Canadian Charter of Rights and Freedoms do not explicitly recognize the right to a healthy environment.

⁵⁹ “Human Right and the Environment”, online: *UN Environment* <<http://web.unep.org/divisions/delc/human-rights-and-environment>>.

their ecosystem and the environment. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*⁶⁰ recognizes the environmental rights of the Indigenous peoples. Article 29 (1) of the UNDRIP provides that:

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.⁶¹

The United Nations first gave the right to a clean and healthy environment global recognition in 1972 through the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*⁶². Principle 1 of the Stockholm Declaration states that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”⁶³. The Stockholm Declaration provided the necessary foundation for the development of environmental rights and regulations in many countries. Furthermore, in 1992, the United Nations by virtue of the *Rio Declaration on Environment and Development (Rio Declaration)*⁶⁴ advances the goal of the Stockholm Declaration and the need to “protect the integrity of the global environmental and developmental system”⁶⁵. Principle 1 of the Rio Declaration provides that “Human beings are at

⁶⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. A/RES.61/295, U.N. Doc. A/61/L.67 (13 September 2007) [UNDRIP]

⁶¹ *Ibid* at art. 29(1).

⁶² *Stockholm Declaration on the Human Environment of the United Nations Conference on the Human Environment*, 16 June 1972, 11 I.L.M. 1416 (1972) [Stockholm].

⁶³ *Ibid* at principle 1. The Stockholm Declaration was adopted June 16, 1972 at the 21st plenary meeting by the United Nations Conference on the Human Environment. This is the first document in international environmental law to recognize the right to a healthy environment.

⁶⁴ *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5 Rev. 1 (1992) at principle 2 [Rio Declaration]

⁶⁵ *Ibid.* at preamble.

the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”⁶⁶

The right to a healthy environment has also been recognized at regional levels. In 1981, the African continent explicitly recognized the right to a healthy environment through the *African Charter on Human and Peoples' Rights* (the Banjul Charter)⁶⁷. The Banjul Charter has been ratified by 53 member states of the African Union, and has become the major international human rights instrument for the promotion and protection of human rights in Africa.⁶⁸ Article 24 of the Banjul Charter provides that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”⁶⁹ Article 16 of the Charter also supports the right to a healthy environment and goes further to make it obligatory for States to protect the health of their citizens. It provides that: “(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State Parties to the present Charter shall take the necessary measures to protect the health of their people...”⁷⁰ In 2001, The African Commission on Human and Peoples' Rights (“African Commission”) in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*⁷¹ invoked the provision of Article 24 among other articles of the Banjul Charter in deciding that the Nigerian government flagrantly violated the right of the Ogoni People of the Niger-Delta region of Nigeria to a healthy

⁶⁶*Ibid.* at principle 1.

⁶⁷ *African Charter on Human and Peoples' Rights (Banjul Charter)*, June 27, 1981, OUA Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October, 1986) [Banjul Charter].

⁶⁸ “African Charter on Human and Peoples' Rights”, online: *African Commission on Human and Peoples' Rights* <<http://www.achpr.org/instruments/achpr/>>.

⁶⁹ Banjul Charter, *supra* note 67 at art. 24.

⁷⁰ *Ibid.* at art. 16.

⁷¹ *Social and Economic Rights Action Center v. Nigeria*, (2001) Afr. Comm. on Hum. and Peoples' Rts. Comm. No. 155/96, Doc No. ACHPR/Comm/A044/1 [SERAC].

environment by destroying their ecosystem, farms, crops, and other food sources. The Commission noted quoting articles 16 and 24 of the Banjul Charter that:

These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”⁷²

The right to a generally satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore, imposes clear obligations upon a government. It requires the State to take reasonable and extended measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.⁷³ Furthermore, the right to a healthy environment has been recognized in the Inter-American human rights system through the instrumentality of the 1988 *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* (Protocol of San Salvador)⁷⁴. Article 11 of the Protocol of San Salvador provides that “(1) [e]veryone shall have the right to live in a healthy environment and to have access to basic public services.”⁷⁵ Article 11 (2) of the Protocol imposes an obligation on the States Parties to “promote the protection, preservation, and improvement of

⁷² Alexandre Kiss, “Concept and Possible Implications of a Right to Environment” in Kathleen E. Mahoney, Paul Mahoney, *Human Rights in the Twenty-first Century: A Global Challenge* (Dordrecht: Nijhoff, 1993) at 553.

⁷³ *SERAC*, *supra* note 72 at para. 52; see Meghan Elisabeth Clarke, *Climate Change and Human Rights: A Case Study of the Canadian Inuit and Global Warming in the Canadian Arctic* (LLM Thesis, University of Toronto, Faculty of Law, 2010) at 51 [unpublished] [Meghan].

⁷⁴ *Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador)*, Nov. 17, 1988, OAS Treaty Series No. 69 (entered into force Nov. 16, 1999) [Protocol of San Salvador].

⁷⁵ *Ibid.* at art. 11.

the environment.”⁷⁶ In Europe, the right to a healthy environment is not explicitly provided for in the European Convention of Human Rights and Fundamental Freedoms nor its Protocols, however, the European Court of Human Rights has decided in a number of cases to recognize this right.⁷⁷ While the right to a healthy environment has gained much popularity across all continents due to its importance in the realization and full enjoyment of other basic human rights, it is unfortunate that there is neither an independent nor distinct environmental rights treaty within the United Nations’ system. The absence of this distinct treaty has undermined the development of the right to a healthy environment in the world. Some scholars have argued that although there is no independent right to a healthy environment, this right has become accepted as a customary international law and as such, given a force of law.

2.4 The Right to a Healthy Environment: A Customary International Law?

Customary international law is a source of international law. It “refers to international obligations arising from established international practices, as opposed to obligations arising from formal written conventions and treaties. Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation, [or *opinio juris*]⁷⁸.”⁷⁹ Essentially, customary international law can be established by practices of states and *opinio juris*.

⁷⁶ *Ibid.* at art. 11(2).

⁷⁷ See Lucretia Dogaru, "Preserving the Right to a Healthy Environment: European Jurisprudence" (2014) 141 *Procedia - Social and Behavioral Sciences* 1346-352. online: <www.sciencedirect.com/science/article/pii/S1877042814036568>; in David Boyd, *supra* note 54, Ole Pedersen notes that despite the absence of an explicit environmental right in the European Convention on Human Rights, the European Court has managed to develop “an elaborate and extensive body of case law which all but in name provides for a right to a healthy environment.”

⁷⁸ *Opinio Juris* (opinion of the law) “denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question.” – “*Opinio Juris* (International Law)”, online: *Legal Information Institute* <www.law.cornell.edu/wex/opinio_juris_%28international_law%29>.

⁷⁹ “Customary International Law”, online: *Legal Information Institute* <www.law.cornell.edu/wex/customary_international_law>.

Article 38 of the Statute of the International Court of Justice (ICJ)⁸⁰ recognizes international conventions, international custom (international customary law) and general principles of law recognized by civilized nations as sources of international law. It also recognizes judicial decisions and the teachings of respected scholars as subsidiary means in determining the law.⁸¹ Scholars have canvassed several arguments in favor of recognizing the right to a healthy environment as a customary international law. This argument has particularly emerged from the point of view that the right to a healthy environment enjoys the status of a customary law due to state practice.⁸² For a State practice to be regarded as a customary law, it must be generally followed by the States, and they must not have the liberty to legally derogate from or disregard the practice.⁸³ It suffices that any practice that states could legally derogate from or disregard does not constitute a customary international law. Furthermore, a state practice must be general and consistent to create customary law.⁸⁴ It may not necessarily be “universally followed, [but] as long as it reflects wide acceptance among states particularly involved in a relevant activity”⁸⁵ it would create customary law. State practice is established through resolutions of the United Nations General Assembly, declarations of United Nations conferences, State statutes or constitutions, national legislation, multilateral and international agreements, and judicial decisions.⁸⁶

Over the years, there have been recurring State practices and developments within the United Nations frameworks, regional human rights system, and national levels that suggest the

⁸⁰ *Statute of the International Court of Justice*, (1945) U.N.T.S. No. 993 at art. 38 [ICJ Statute].

⁸¹ *Ibid*; John Lee, “The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law” (2000) 25: 2 Colum. J. Env’tl. L. 283 at 302-303 [Lee].

⁸² *Ibid.* at 21.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ See Jennifer A. Downs, “A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right” (1993) 3:351, Duke J Comp & Intl L 386; *Ibid.* at 22.

emergence and acceptance of the right to a healthy environment as a customary international law. At the international level, the 1972 *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration)⁸⁷, the *United Nations' Draft Principles on Human Rights and the Environment*⁸⁸ are typical examples and evidence to buttress the development of the right to a healthy environment as a customary international law.⁸⁹ These frameworks have guided States in recognizing and domesticating this right in their national legislation and constitutions. They have also facilitated the protection of environmental rights within states. The United Nations' *Draft Principles on Human Rights and the Environment* provides that: "[a]ll persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."⁹⁰

At the regional level, Article 24 of the Banjul Charter⁹¹ and Article 11 of the 1988 Protocol of San Salvador⁹² are instances of the express recognition of the right to a healthy environment within the African and Latin American regions. These regimes have developed practices of State which have, in turn, created customary international law. What is more, the right to a healthy environment has been extensively recognized in national constitutions. Over 110 countries have given the right to a healthy environment a binding constitutional recognition in their constitutions.⁹³ Article 225 of the 1988 Brazilian Constitution provides that "[e]veryone is entitled

⁸⁷ Stockholm Declaration, *supra* note 62.

⁸⁸ *Draft Principles on Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, Annex I (1994). [Draft Principles].

⁸⁹ See Bridget Lewis, "Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection" (2012) 8: 1 Macquarie J Comp & Intl Env. L, online (pdf): SSRN <<https://ssrn.com/abstract=2673932> https://eprints.qut.edu.au/53993/1/03_Lewis.pdf> [Lewis].

⁹⁰ Draft Principles, *supra* note 88 at pt. 1(2).

⁹¹ Banjul Charter, *supra* note 67 at 24.

⁹² Protocol of San Salvador, *supra* note 74 at art. 11.

⁹³ See Article 41 of the Constitution of Argentina 1853; See Article 79 of the Constitution of Colombia 1991; See Article 46 of the Constitution of the Republic of the Congo 1992; Constitution of Costa Rica 1949; See Article 69 of the Constitution of the Republic of Croatia 2001; Constitution of the Republic of Chechen 2003. See also the

to an environment which is ecologically balanced, which is an asset for the people's common use and is essential to a healthy life.”⁹⁴ Also, the constitution of the Republic of Argentina provides that residents “enjoy the right to a healthy, balanced environment which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations.”⁹⁵ In addition, the Nigerian Constitution makes provision for the protection of the environment and also gives the State the duty to protect and improve the environment. Section 20 provides that “[t]he state shall protect and improve the environment and safeguard the water, air, land, forest and wildlife in Nigeria.”⁹⁶ The section intends to ensure the right to a healthy environment. Furthermore, Article 79 of the 1991 Constitution of Colombia recognizes the right to a healthy environment.⁹⁷ It has been argued that this suggests a consistent State practice sufficient enough to create customary international law.⁹⁸

Several judicial decisions have equally confirmed the right to a healthy environment as a fundamental human right. A striking example of these judicial decisions is the case of *Fundepublico v. Mayor of Bugalagrande and others*⁹⁹, the Constitutional Court of Colombia in its decision recognized the right to a healthy environment as a fundamental human right.¹⁰⁰ The Court “made reference to rights contained in the Colombian Constitution and also to “recent

Constitution of the following countries: Constitution of Angola, Argentina, Belarus, Belgium, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Ecuador, Finland, Georgia, Ghana, Hungary, India, Mexico, Niger, Namibia, Portugal, Russia, Romania, Sao Tome, Saudi Arabia, Slovakia, Ukraine, and Zambia.

⁹⁴ *Constituição da República Federativa do Brasil, 1988 [Constitution of the Federative Republic of Brazil], art 225; See also Lewis, supra note 90.*

⁹⁵ *Constitución Nacional de la República Argentina, 1852 [Republic of Argentina Constitution], art 41. See also Macquarie Journal of International and Comparative Environmental Law, Volume 7, Number 2*

⁹⁶ *The Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 20.*

⁹⁷ *The Constitution of Colombia, 1991 art. 79.*

⁹⁸ Lee, *supra* note 81 at 308; see also Lewis, *supra* note 89.

⁹⁹ Decision of the Constitutional Court of Columbia, June 17, 1992. See Lee, *supra* note 79 at 318. *Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Second Progress Report Prepared by Mrs. Fatma Ksentini, Special Rapporteur, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention and Discrimination and Protection of Minorities, 45th Sess. Agenda Item 5, U.N. Doc. E/CN.4/Sub.2/1993/7 (1993) at 17 [Ksentini Second Report].*

¹⁰⁰ Lee, *supra* note 81 at 318.

developments in international law.”¹⁰¹ While the argument recognizing State practice in respect of the right to a healthy environment as a principle of customary international law continues to gain popularity, there are views that a nation’s environmental practices would not qualify to create this right as a customary international law if the practices “are not undertaken with a sense of international legal obligation based on its recognition of a right to a healthy environment.”¹⁰² Arguably, the right to a healthy environment has not been universally accepted and acknowledged as a customary international law. This reality has made the call for the unequivocal recognition of this right as a fundamental human right in a distinct and separate international treaty just like the right to life and other fundamental human rights. Alternatively, the right to a healthy environment could also be established by exploring the nexus between human rights and environmental rights/protection.

2.5 The Nexus between Human Rights and Environmental Protection

The search for legal regimes and frameworks to effectively address the impacts of environmental degradation and climate change on Indigenous peoples and the Arctic region has witnessed several creative attempts at establishing the intersections of existing human rights and environmental rights. These attempts have considered addressing environmental issues through the lens of the human rights system, and by focusing on rights-based approaches to drive the discussion on establishing environmental rights. The United Nations’ human rights mechanisms have offered the possibilities of achieving this. Although the right to a healthy environment *per se* is not expressly recognized by any of the United Nation’s human rights treaties or regimes, there

¹⁰¹ *Ibid.*; See Ksentini Second Report, *supra* note 99 at 17.

¹⁰² Lee, *supra* note 81 at 315.

exists a close link between human rights abuses and environmental degradation.¹⁰³ This link becomes more significant because it is impossible to achieve the full enjoyment and realization of one's fundamental human rights in an unhealthy environment.¹⁰⁴ The view that "a healthy environment is a necessary precondition for the promotion of several recognized rights"¹⁰⁵ has been acknowledged within the international human rights system. Justice Weeramantry of the International Court of Justice in his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*¹⁰⁶ mentioned as follows:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.¹⁰⁷

The Indigenous peoples' environment plays a vital role in their lives, as such, any damage to their environment threatens their human rights, culture, and their livelihood. Therefore, the fundamental human rights of the Indigenous peoples and how these rights are affected by environmental degradation will be addressed below.

¹⁰³ Dommen Caroline, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998-1999) 11 Geo. Int'l. Env'tl. L. Rev. 1 at 11.

¹⁰⁴ See Lewis, *supra* note 89.

¹⁰⁵ *Ibid.* at 2. There is a great deal of literature elaborating on the relationship between the environment and human rights. See generally, Sumudu, *supra* note 45; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (New York: Oxford University Press, 2008).

¹⁰⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 [Hungary v Slovakia].

¹⁰⁷ *Ibid.* (Separate Opinion of Vice-President Weeramantry)

2.5.1 Right to Life

“The right to life is the most fundamental of all human rights.”¹⁰⁸ This right is founded on the need to protect individuals from being arbitrarily deprived of their lives. The Human Rights Committee in its General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life¹⁰⁹ remarked that the right to life “is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation.”¹¹⁰ The Committee further remarked that “[t]he right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.”¹¹¹

The right to life has been accorded thorough recognition in the international human right frameworks. Article 3 of the UDHR provides for the right to life. It states that “everyone has the right to life, liberty and security of person.”¹¹² Furthermore, Article 6 (1) of the ICCPR states that: “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹¹³ This right has also been recognized in several international and regional instruments.¹¹⁴ There is a robust link between right to life and the right

¹⁰⁸ “Right to Life”, online: *Liberty Victoria* <<https://libertyvictoria.org.au/content/right-life>>.

¹⁰⁹ HRC, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018 (CCPR/C/GC/36).

¹¹⁰ *Ibid.* at General remarks 2.

¹¹¹ *Ibid.* at General remarks 3.

¹¹² *UDHR*, *supra* note 46 at art. 3.

¹¹³ *ICCPR*, *supra* note 50 at art.6 (I).

¹¹⁴ *Convention on the Rights of the Child*, 20 November 1989, 28 I.L.M. 1448 (entered into force 2 September 1990) at art. 24 [*CRC*]; *American Convention on Human Rights*, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978) at art. 4 [*American Convention*]; *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 at art. 10; *Banjul Charter*, *supra* note 67 at art. 4.

to a healthy environment. An unhealthy environment is a threat to the right to life and, as such, could be a violation of the right to life. Polluted water, contaminated food, and unclean air are the consequential effects of an unhealthy environment which could jeopardize the full enjoyment of the right to life. In the Statement of the former Executive Director of the United Nations Environment Programme, Klaus Toepfer to the 57th Session of the Commission on Human Rights in 2001, he noted that:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognise that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.¹¹⁵

2.5.2 Right to Health

The right to health is one of the fundamental human rights recognized in the United Nations' human rights system. This right is central to human existence. The World Health Organization in its constitution defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."¹¹⁶ It further states that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."¹¹⁷ The enjoyment of this right is vital to all other aspects of a person's life and is crucial to the

¹¹⁵ See Dinah Shelton, "Human Rights, Health & Environmental Protection: Linkages in Law & Practice (Background paper for the World Health Organization, 2002) [unpublished].

¹¹⁶ *Constitution of the World Health Organization*, July 22, 1946, 14 U.N.T.S. 185 at preamble. [WHO Constitution].

¹¹⁷ *Ibid.*

realization of many other rights. It is incontestable that the right to health is crucial to the full realization of every other human right. The right to health has been recognized by the UDHR, the ICCPR and its optional Protocol, and the ICESCR. Article 25 of the UDHR provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."¹¹⁸ Article 12(1) of the ICESCR affirms that "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹¹⁹ The right to health is also protected by article 24 of the *Convention on the Rights of the Child*¹²⁰, article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*¹²¹, articles 12 & 14 of the *Convention on the Elimination of All Forms of Discrimination Against Women*¹²², article XI (11) of the *American Declaration on Rights and Duties of Man*¹²³, and Article 25 of the *International Convention on the Rights of Persons with Disabilities*.¹²⁴ The link between the right to health and the environment is inextricable. This underscores the importance of a healthy environment in ensuring the full enjoyment of the right to health. Environmental pollution and climate change undermine an individual's right to health.

¹¹⁸ UDHR, *supra* note 46 at art. 25.

¹¹⁹ ICESCR, *supra* note 51 at art. 12(1).

¹²⁰ CRC, *supra* 114 at art. 12.

¹²¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 5 I.L.M. 350 (entered into force 4 January 1969) at art. 5 [ICERD].

¹²² *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 at art. 12 and 14 [CEDAW];

¹²³ *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Columbia, March 30-May 2, 1948 at article XI (11) [American Declaration]

¹²⁴ *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 at art. 25(f) and art.25. [CRPD].

2.5.3 Right to be Free from Racial Discrimination

The right against racial discrimination is often regarded as a third-generation human right. This right also has a bearing on environmental protection and a healthy environment. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) imposes a duty on States to protect the rights of racial groups in ensuring the full enjoyment of their human rights and freedoms. Article 2(2) of the ICERD states that:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.¹²⁵

Environmental degradation violates the rights of the individuals and racial groups to enjoy social, economic, and cultural rights.

2.5.4 Right to Property, Privacy and/or Inviolability of the Home and Family

The right to property is protected under the international human rights system. So also is the right to privacy and/or inviolability of the home and family. Article 12 of the UDHR states that: “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹²⁶ Article 17 of the UDHR provides that: “(1) [E]veryone has the right to own property alone as well as in association with others. (2)

¹²⁵ ICERD, *supra* note 121 at art. 2(2).

¹²⁶ UDHR, *supra* note 46 at art. 12; See ICCPR, *supra* note 50 at art. 17.

No one shall be arbitrarily deprived of his property.”¹²⁷ Environmental degradation possesses the potential of depriving an individual his property.¹²⁸

2.5.5 Right to Culture

The right to culture is especially significant to minorities and Indigenous peoples. It involves the right to participate in one’s cultural life and enjoy one’s culture. International human rights instruments recognize the right to culture. Article 27(1) of the UDHR provides that: “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.¹²⁹ Article 15 of the ICESCR also affirms this right and states that: “[t]he States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life...”¹³⁰ Furthermore, Article 30 of the Convention on the Rights of the Child recognizes the right of children and Indigenous persons to enjoy their culture. It provides that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.¹³¹

¹²⁷ UDHR, *supra* note 46 at art. 17.

¹²⁸ See also *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull. 59 (entered into force 5 September, 1991) at art. 4(1) [Greenpeace 169]; *Convention on Biological Diversity*, June 5, 1992, 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992) at art. 8(j) [CBD]; *American Convention*, *supra* note 114; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953) at art. 8. [European Convention].

¹²⁹ UDHR, *supra* note 46 at art. 27(1).

¹³⁰ ICESCR, *supra* note 51 at art. 15.

¹³¹ CRC, *supra* note 114 at art. 30.

The role of the environment in guaranteeing the enjoyment of one's culture cannot be undermined. Therefore, environmental damage would have harrowing impacts on an individual's right to enjoy his culture.

2.5.6 Right to food

Several international human right regimes recognize the right to food as a fundamental human right. Article 11 of the ICESCR provides that:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmers...¹³²

The UN Committee on Economic, Social and Cultural Rights in its General Comment 12 notes that “[t]he human right to adequate food is of crucial importance for the enjoyment of all rights.”¹³³ The committee also affirms that:

the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of

¹³² *ICESCR*, *supra* note 51 at art. 30.

¹³³ CESCR, *General Comment 12 on the Right to Adequate Food*, E/C.12/1999/5 reproduced in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 63 [CESCR Comment 12].

appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.¹³⁴

The right to food is also recognized in article 24 of the *Convention on the Rights of the Child* (CRC)¹³⁵ and article 14(2)(h) of the *Convention on the Elimination of All Forms of Discrimination Against Women*.¹³⁶ It is noteworthy that the right to food also extends to the right to water. The right to adequate food and water is threatened in an unhealthy environment. Therefore, there is an interconnection between the right to food and the right to a healthy environment.

2.5.7 Right to an Adequate Standard of Living

The right to an adequate standard of living is one of the human rights recognized in international human rights frameworks. It is regarded as a social right. This right guarantees the right of every individual to an adequate standard of living. The UDHR and the ICESCR recognize the right to an adequate standard of living. According to article 25(1) of the UDHR “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family...”¹³⁷ Also, article 11(1) of the ICESCR provides that: “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions.”¹³⁸ The Covenant imposes an obligation on States to take necessary steps to safeguard this fundamental right. This right can be invoked whenever there is environmental damage. It is impossible to enjoy the right to an adequate standard of living in an unhealthy environment.

¹³⁴ *Ibid.* at 4.

¹³⁵ *CRC*, *supra* note 114 at art. 24.

¹³⁶ *CEDAW*, *supra* note 122 at art. 14(2)(h).

¹³⁷ *UDHR*, *supra* note 46 at art. 25(1).

¹³⁸ *ICESCR*, *supra* note 51 at art. 11(1).

2.5.8 Indigenous Peoples' Rights

Under international law, the rights of the Indigenous peoples are specifically recognized and protected. This recognition of Indigenous peoples' rights become germane in view of the close connection between the Indigenous peoples and their environment. Whenever there is environmental damage in the Indigenous peoples' communities, there is a simultaneous violation of their human rights. Environmental pollution poses a threat to the tradition, spirituality, and culture of the Indigenous peoples. Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹³⁹

The right to enjoy culture, practice religion and speak in one's own language as recognized in Article 27 is violated when the ecosystem and environment is damaged by acts of individuals, corporations or states. Furthermore, the United Nations through its *Declaration on the Rights of Indigenous Peoples* recognizes the right to conserve and protect the environment of the Indigenous Peoples. Article 29 (1) *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) states that:

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.¹⁴⁰

¹³⁹ ICCPR, *supra* note 50 at art.27.

¹⁴⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. A/RES.61/295, U.N. Doc. A/61/L.67 (13 September 2007) at art 29(1) [Indigenous Declaration].

Undoubtedly, the Indigenous peoples' rights are violated when their environment is not conserved and protected against environmental degradation and climate change. The International Labour Organisation's *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*¹⁴¹ is a binding international convention of the ILO which provides for the rights of the Indigenous peoples. Article 7(4) of the Convention provides that: "[g]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."¹⁴² This provision imposes an obligation on the governments to protect and preserve. A failure on the part of the government to perform this duty provokes environmental damage which violates their rights.

In addition to the Indigenous rights set out above, there is also the right to self-determination. The right to self-determination is a fundamental and binding principle within the international law framework. The *United Nations Charter*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Political Rights* (ICESCR), and the *United Nations Declaration on Indigenous Peoples* (UNDRIP) have all expressly acknowledged this right. Articles 1(1) of both ICCPR and ICESCR provide that: "[a]ll peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."¹⁴³ Articles 1(2) of ICCPR and ICESCR state that: "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no

¹⁴¹ *ILO Convention 169*, *supra* note 128.

¹⁴² *Ibid.* at art. 7(4)

¹⁴³ *ICCPR*, *supra* note 50 at art. 1(1); *ICESCR*, *supra* note 51 at art. 1(1).

case may a people be deprived of its own means of subsistence.”¹⁴⁴ It is well established that environmental pollution and climate change have adverse impacts on the culture and means of subsistence of the Indigenous peoples. Environmental degradation violates the right of the Indigenous peoples to self-determination. The right to self-determination has been specifically affirmed by the UNDRIP. Article 3 of the UNDRIP provides that: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁴⁵

¹⁴⁴ *ICCPR*, *supra* note 50 at art. 1(2); *ICESCR*, *supra* note 51 at art. art. 1(2).

¹⁴⁵ Indigenous Declaration, *supra* note 140 at art. 3.

CHAPTER THREE

CLIMATE CHANGE AND THE ARCTIC

*Climate change in polar regions is expected to be among the largest and most rapid of any region on the Earth, and will cause major physical, ecological, sociological, and economic impacts, especially in the Arctic...*¹⁴⁶

- IPCC, 2001

The first chapter of this thesis gave a brief overview of climate change and its impact on the peoples of the Arctic – the Inuit, and the region itself. This chapter will attempt to comprehensively address the observed impact of climate change in the Arctic, and the key indicators of climate change, which substantiated the claims of the Inuit in their petition to the Inter-American Commission on Human Rights.

The United Nations General Assembly in 1989 recognized climate change as a global environmental problem.¹⁴⁷ It is no longer in doubt that the Arctic region is one of the regions that is experiencing the devastating effect of climate change.¹⁴⁸ This view has been corroborated by irrefutable scientific evidence, human observations, and the special knowledge of the Indigenous peoples. Climate change is seen to be putting unparalleled pressure on the peoples of the Arctic

¹⁴⁶ ACIA Overview, *supra* note 24 at 15.

¹⁴⁷ Veronica, *supra* note 14.

¹⁴⁸ Greenpeace, *supra* note 17.

and the region.¹⁴⁹ The temperatures in the Arctic are rising faster than any other region of the world¹⁵⁰ as it is warming “over twice as fast as the global average”.¹⁵¹ As noted by Robert Corell:

“Climate change is being experienced particularly intensely in the Arctic. Arctic average temperature has risen at almost twice the rate as that of the rest of the world in the past few decades. Widespread melting of glaciers and sea ice and rising permafrost temperatures present additional evidence of strong Arctic warming. These changes in the Arctic provide an early indication of the environmental and societal significance of global consequences.”¹⁵²

Human activities have been deemed responsible for the rise in global temperatures. According to the 2001 report of the Intergovernmental Panel on Climate Change (IPCC), “there is new and stronger evidence that most of warming observed over the last 50 years is attributable to human activities.”¹⁵³ The impact of climate change, particularly as it affects the culture, ecosystem, and livelihoods of the peoples of the Arctic has become one of the topical issues dominating the conversations amongst researchers, scholars, human rights advocates, policy-makers, environmentalists, and Arctic inhabitants.¹⁵⁴

One of the most substantial pieces of scientific evidence regarding the impact of climate change in the Arctic is the 2004 Arctic Climate Impact Assessment (ACIA)¹⁵⁵. The ACIA provided the necessary evidence, basis and justification for the 2005 Inuit petition to the Inter-American

¹⁴⁹ See “Arctic Indigenous Peoples, Displacement, and Climate Change: Tracing the Connections”, online: *Brookings* <www.brookings.edu/events/arctic-indigenous-peoples-displacement-and-climate-change-tracing-the-connections/>.

¹⁵⁰ “It’s Time to Listen to the Inuit on Climate Change”, online: *Canadian Geographic* <www.canadiangeographic.ca/article/its-time-listen-inuit-climate-change>.

¹⁵¹ Adam Stepien, “Arctic Indigenous Peoples, Climate Change Impacts, and Adaptation”, E-International Relations (10 April 2014), online: <www.e-ir.info/2014/04/10/arctic-indigenous-peoples-climate-change-impacts-and-adaptation/> [Stepien].

¹⁵² Robert W. Corell, Challenges of Climate Change: An Arctic Perspective, (2006) 35 *Ambio* 148 at 149 [Corell].

¹⁵³ IPCC 2001, *supra* note 29; ACIA Overview, *supra* note 24 at 8.

¹⁵⁴ Stepien, *supra* note 151.

¹⁵⁵ ACIA Overview, *supra* note 24.

Commission on Human Rights. The Arctic Council¹⁵⁶ requested the Arctic Climate Impact Assessment, which “is a comprehensively researched, fully referenced, and independently reviewed evaluation of arctic climate and its impacts for the region and for the world.”¹⁵⁷ Through several indicators, the ACIA confirms the vulnerability of the Arctic to climate change, and concludes that the “Arctic is now experiencing some of the most rapid and severe climate change on earth.”¹⁵⁸ More recent and robust evidence of the impact of climate change in the Arctic is the assessment of the Arctic Monitoring and Assessment Programme (AMAP) on Snow, Water, Ice and Permafrost in the Arctic (SWIPA)¹⁵⁹ which was conducted between 2008 and 2011. The SWIPA assessment is a follow-up to the Arctic Climate Impact Assessment (ACIA). Some of the key indicators adopted in the Arctic Climate Impact Assessment, the SWIPA, and other reports regarding the observed impacts of climate change in the Arctic will be considered below.

Increase in Arctic Temperatures

Rising temperature is one of the incontrovertible indicators of the impact of climate change in the Arctic. Several scientific reports and policy statements validate this reality. According to the ACIA, “temperatures have increased sharply in recent decades over most of the region, especially in winter. Winter increases in Alaska and Western Canada have been around 3-3-4°C over the past half century.”¹⁶⁰ It is projected that the annual average temperatures will rise across the entire

¹⁵⁶ *Ibid.* (“The Arctic Council is a high-level intergovernmental forum that provides a mechanism to address the common concerns and challenges faced by arctic people and governments...”).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ AMAP, 2012. *Arctic Climate Issues 2011: Changes in Arctic Snow, Water, Ice and Permafrost*. SWIPA 2011 Overview Report. *Arctic Monitoring and Assessment Programme* (AMAP), Oslo. xi + 97. Online: AMAP <www.amap.no/documents/doc/arctic-climate-issues-2011-changes-in-arctic-snow-water-ice-and-permafrost/129>. [SWIPA]. The SWIPA assessment was a follow-up to the *Arctic Climate Impact Assessment (ACIA)* published in 2005. The ACIA is the benchmark against which the assessment of change in the Arctic cryosphere was developed.

¹⁶⁰ ACIA Overview, *supra* note 24.

Arctic, “with increases of roughly 3-5°C over the land areas and up to 7°C over the oceans. Winter temperatures are also projected to rise significantly, with increases of 4-7°C over the land areas and 7-10°C over the oceans.”¹⁶¹ In addition, the recent 2018 IPCC Special Report on the impact of global warming has provided further proof of the rise in warming and temperatures of the Arctic. It notes that “warming greater than the global annual average is being experienced in many land regions and seasons, including two to three times higher in the Arctic.”¹⁶² The implications of the rising temperatures are dire as they will negatively impact the natural and climate systems of the peoples of the Arctic.

Melting Sea Ice

Melting of sea ice is another key indicator of the impact of climate change and warming in the Arctic. The importance of the Arctic sea ice cannot be undermined; it helps in keeping the region cool while also moderating global climate.¹⁶³ It equally affects “surface reflectivity, cloudiness, humidity, exchange of heat and moisture at the ocean surface, and ocean currents.”¹⁶⁴

As of 2004, the ACIA notes that:

Over the past 30 years, the annual average sea-ice extent has decreased by about 8%, or nearly one million square kilometers, an area larger than all of Norway, Sweden, and Denmark combined, and the melting trend is accelerating. Sea-ice extent in summer has declined more dramatically than the annual average, with a loss of 15-20% of the late-summer ice coverage. There is also significant variability from year to year... Sea ice has also become thinner in recent decades, with arctic-wide average thickness reductions

¹⁶¹ *Ibid.* at 28.

¹⁶² IPCC, 2018: Global warming of 1.5°C. *An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, In the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* [V. Masson-Delmotte, P. Zhai, H. O. Pörtner, & D. Roberts, et. al (eds.)]. (In Press) online: IPCC <<https://www.ipcc.ch/sr15/>> [IPCC 2018].

¹⁶³ “Quick Facts on Arctic Sea Ice”, online: NSIDC <<https://nsidc.org/cryosphere/quickfacts/seaice.html>>.

¹⁶⁴ ACIA Overview, *supra* note 24 at 24.

estimated at 10-15%, and with particular areas showing reductions of up to 40% between the 1960s and late 1990s.¹⁶⁵

It is projected that there would be additional declines of roughly 10-50% in the annual average sea-ice extent by 2100.¹⁶⁶ This decline will lead to more warming in the Arctic due to the reduction in the reflectivity of the ocean surface.¹⁶⁷ The SWIPA corroborates this view. Furthermore, in 2018, the US National Aeronautics and Space Administration and National Snow and Ice Data Center reported that on September 19 and 23 2018, the Arctic sea-ice extent declined to 1.77 million square miles (4.59 million square kilometers).¹⁶⁸

For the Inuit, the consequences of the melting or reduced sea ice are multi-dimensional, having economic, environmental, and social implications. It also negatively impacts their hunting culture, food security, and way of life. Melting sea-ice has forced the Arctic animals which the people hunt, to “decline, become less accessible, and possibly become extinct.”¹⁶⁹ Reduction in sea-ice has affected and will continue to affect the habitat of polar bears, seals, sea birds, walrus, and several other marine animals.

Thawing Permafrost

The rise in the temperatures of permafrost presents further evidence of the impact of climate change and warming in the Arctic. Permafrost is ground that has been frozen for two or

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* at 30.

¹⁶⁷ *Ibid.*

¹⁶⁸ “2018 Arctic Summertime Sea Ice Minimum Extent Tied for Sixth Lowest on Record”, online: NASA <www.nasa.gov/feature/goddard/2018/annual-arctic-sea-ice-minimum-announcement>; see also “Arctic Sea Ice Extent Arrives at its Minimum”, online: NSIDC <<http://nsidc.org/arcticseaicenews/2018/09/arctic-sea-ice-extent-arrives-at-its-minimum/>>.

¹⁶⁹ ACIA Overview, *supra* note 24 at 16.

more years.¹⁷⁰ It “underlies most of the Arctic land area and extends under parts of the Arctic Ocean.”¹⁷¹ Permafrost is composed of rock, soil, sediments, and varying amounts of ice that bind the elements together.”¹⁷² Permafrost acts as a freezer as it “stores the carbon-based remains of plants and animals that froze before they could decompose.”¹⁷³ It also stores microbes and poisonous mercury.¹⁷⁴ According to scientists’ estimation, “the world’s permafrost holds 1,500 billion tons of carbon, almost double the amount of carbon that is currently in the atmosphere.”¹⁷⁵ Whenever there is thawing of the permafrost carbon dioxide and methane are released into the atmosphere.¹⁷⁶ The ACIA records that “permafrost has warmed by up to 2°C in decades, and the depth of the layer that thaws each year is increasing in many areas.”¹⁷⁷ The recent report of the Snow, Water, Ice and Permafrost in the Arctic (SWIPA)¹⁷⁸ assessment provides evidence to corroborate the report of the ACIA on the thawing of the permafrost. There are also predictions that the temperatures of the ground will continue to increase in the Arctic “between now and the end of the 21st century.”¹⁷⁹ What is more, in 2015, the U.S. Geological Survey notes that: “[i]n the 1980s, the temperature of permafrost in Alaska, Russia and other Arctic regions averaged to be almost 18F. Now the average is just over 28F.”¹⁸⁰ The consequences of the thawing permafrost

¹⁷⁰ Renee Cho, “Why Thawing Permafrost Matters” (11 January, 2018), online (blog): *The Earth Institute, Columbia University* < blogs.ei.columbia.edu/2018/01/11/thawing-permafrost-matters/> [Cho]; see also Brian Resnick, “Melting Permafrost in the Arctic is Unlocking Diseases and Warping the Landscape” (6 February 2018), online: *Vox* <www.vox.com/2017/9/6/16062174/permafrost-melting> [Resnick].

¹⁷¹ SWIPA, *supra* note 160, online: AMAP <www.amap.no/documents/doc/arctic-climate-issues-2011-changes-in-arctic-snow-water-ice-and-permafrost/129>.

¹⁷² Cho, *supra* note 170.

¹⁷³ *Ibid.*

¹⁷⁴ Resnick, *supra* note 170.

¹⁷⁵ Cho, *supra* note 170.

¹⁷⁶ *Ibid.*

¹⁷⁷ ACIA Overview, *supra* note 24 at 12.

¹⁷⁸ SWIPA, *supra* note 159.

¹⁷⁹ *Ibid.* at 45.

¹⁸⁰ “Scientists Predict Gradual, Prolonged Permafrost Greenhouse Gas Emissions” (8 April 2015), online: *U.S. Geological Survey* <www.usgs.gov/news/scientists-predict-gradual-prolonged-permafrost-greenhouse-gas-emissions>; Resnick, *supra* note 170.

can be felt in the destruction of buildings, infrastructure and other amenities that are crucial to the survival and overall wellbeing of the people of the Arctic. The thawing permafrost also causes flooding, erosion, and destruction of sewage pipes which then causes the outbreak of waterborne diseases.¹⁸¹ Furthermore, the thawing permafrost releases trapped microbes and poisonous mercury into the atmosphere. These, undoubtedly, have implications on human health.

Melting Glaciers

Glaciers are generally made up of snow, ice, and rock which form large, thickened ice masses, over time.¹⁸² They are mostly located in Polar Regions like the Arctic.¹⁸³ Melting of the ice sheets and the glaciers form parts and evidence of the impacts of Arctic warming and climate change. The rate at which the Arctic glaciers are melting is alarming and unprecedented. The melting of glaciers now contributes significantly to sea level rise, not only in the Arctic but globally as well.¹⁸⁴ According to the ACIA, there are projections that the “arctic glaciers to global sea-level rise will accelerate over the next 100 years, amounting to roughly four to six centimeters by 2100”¹⁸⁵ The 2011 SWIPA notes the substantial increase in the rate of loss from glaciers since 1995 to be equal or similar to the rate of loss from the Greenland Ice Sheet.¹⁸⁶ In addition, further assessment by AMAP shows that “[i]n the Canadian Arctic, the average net loss of ice has increased three times since 2005.”¹⁸⁷

¹⁸¹ ACIA Overview, *supra* note 24 at 73, 77.

¹⁸² “What is a glacier?” online: NSIDC <nsidc.org/cryosphere/glaciers/questions/what.html>.

¹⁸³ *Ibid.*

¹⁸⁴ ACIA Overview, *supra* note 24 at 8.

¹⁸⁵ *Ibid.* at 41.

¹⁸⁶ SWIPA, *supra* note 159.

¹⁸⁷ *Ibid.*

Sea Level Rise

The rise in sea level is a key indicator of climate change in the Arctic. The rise in sea level is a direct consequence of the melting glaciers and ice sheets as they are noted as the most significant contributor to rising sea level. For instance,

Arctic glaciers, ice caps, and the Greenland Ice Sheet contributed 1.3 mm – over 40% – of the total 3.1 mm global sea level rise observed every year between 2003 and 2008. These contributions from the Arctic to global sea level rise are much greater than previously measured.¹⁸⁸

It is projected that the “contributions to sea level rise from the Greenland Ice Sheet and Arctic ice caps between 2000 and 2020 range from –2 mm to +2 mm per year.”¹⁸⁹ Implications of the rising sea level for the people of the Arctic and the world include erosion and flooding amongst others.¹⁹⁰ Rising sea level causes coastal erosion and also increases the risk of flooding which could submerge houses, properties and homes.¹⁹¹

Increasing Precipitation

The increase in Arctic precipitation is observed as evidence of climate change in the Arctic. The SWIPA notes that the “Arctic precipitation (rain and snow) has increased by about 8% on average over the past century. Greater increases are projected for the next 100 years.”¹⁹² This

¹⁸⁸ *Ibid.* at IX. Before now, the ACIA noted that the “Global and arctic sea level has risen 10-20 centimeters in the past 100 years. About an additional half meter of sea-level rise (with a range of 10 to 90cm) is projected to occur during this century. The increase in the Arctic is projected to be greater than the global average.” – ACIA Overview, *supra* note 25 at 13. Furthermore, “latest models predict a rise of 0.9 to 1.6 m above the 1990 level by 2100, with Arctic ice making a significant contribution.” - SWIPA, *supra* note 160 at IX.

¹⁸⁹ SWIPA, *supra* note 159 at IX.

¹⁹⁰ *Ibid.* at 11, 86.

¹⁹¹ *Ibid.* at 86.

¹⁹² SWIPA, *supra* note 159.

observation is in direct consonance with the report of the ACIA. The increase in precipitation poses the risk of flooding¹⁹³ and the likelihood of an increase in the volume of organic pollutants and mercury that are in the region. It also increases river flow and causes changes to the freshwater flux.¹⁹⁴

Increase Ultraviolet (UV) Radiation Levels

Another observed impact of climate change in the Arctic is the increase in ultraviolet radiation levels. The ACIA notes that “UV reaching the earth’s surface is a growing concern in the Arctic, largely due to depletion of stratospheric ozone caused by emissions of chlorofluorocarbons and other manmade chemicals over the last 50 years.”¹⁹⁵ For the people of the Arctic, the consequences of the increases in UV levels are distressing. The rise in UV levels could cause skin cancer, viral infections, skin diseases, cataracts, immune system suppression, and several other skin illnesses.¹⁹⁶

Other Impacts of Climate Change

Further impacts of climate change in the Arctic and its inhabitants include those on transportation as well as the access to Arctic resources, natural system, and freshwater ecosystems.¹⁹⁷ The Arctic possesses resources which are valuable globally. Access to resources such as fish are being frustrated due to the climate change,¹⁹⁸ and in addition, climate change has

¹⁹³ ACIA Overview, *supra* note 24 at 117.

¹⁹⁴ SWIPA, *supra* note 159.

¹⁹⁵ ACIA Overview, *supra* note 24 at 95.

¹⁹⁶ *Ibid.* at 102.

¹⁹⁷ *Ibid.* at 67.

¹⁹⁸ *Ibid.*

continued to disrupt the habitat of marine species, ice-dependent seals, seas birds, seals, the Walrus, polar bears, and several other animals. The climate no longer supports the culture and means of livelihood of the Inuit as it has previously.¹⁹⁹ The Inuit hunters have confirmed that the sea ice is thinning and the decrease in the numbers of ringed seals.²⁰⁰

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* at 92.

CHAPTER FOUR

THE GLOBAL LEGAL REGIMES ON CLIMATE CHANGE AND THE INUIT (THE ARCTIC)

This chapter focuses on the current regimes and frameworks on climate change within the United Nations system and their significance or otherwise to the Inuit in their search for legal remedies. It will also address the dispute resolution mechanisms within these international regimes and their system of enforcement. Furthermore, this chapter will seek to answer the question of whether or not the current global regimes on climate change provide an effective mechanism for the peoples of the Arctic to seek redress to defend their ecosystem (environment), culture, and way of life.

4.1 International Instruments on Climate Change

The entire world has continued to experience the increase in emissions of greenhouse gases (GHGs) in an unprecedented fashion since the beginning of the Industrial Revolution.²⁰¹ Greenhouse gas emissions have increased by about 45%.²⁰² And there is a general consensus that GHGs are the primary culprit responsible for climate change and global warming. For obvious reasons, climate change has generated much concern and attention from global communities over the years. Nations have explored several platforms to express their concerns on the dramatic threat of a changing climate. They have also come together to negotiate and endorse several climate change related multilateral environmental agreements (MEAs) and instruments. These MEAs

²⁰¹ Makenna Schumacher, “The Issue of Global Climate Change” (02 July 2018) online (blog): *Facing the Future* <www.facingthefuture.org/blogs/news/the-issue-of-global-climate-change>.

²⁰² *Ibid.*

include the United Nations Framework Convention on Climate Change (UNFCCC)²⁰³, the Kyoto Protocol²⁰⁴, Marrakech Accord²⁰⁵, and the recent Paris Agreement²⁰⁶ among others. Some of these MEAs will be discussed below under different subheadings.

4.1.1 United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC was the first United Nation's framework to respond to climate change. In December of 1990, the United Nations General Assembly established the International Negotiating Committee (INC) with the mandate to negotiate and produce the text of the Framework Convention for Climate Change.²⁰⁷ Then, in 1992, the INC adopted the *United Nations Framework Convention on Climate Change* (UNFCCC) or (Convention) and opened same for signature at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro (the Earth Summit). The UNFCCC entered into force on March 21st 1994 after its ratification by States.²⁰⁸ The convention enjoyed global acceptance and universal coverage as 154 States signed

²⁰³ UNFCCC, *supra* note 2.

²⁰⁴ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UN.Doc. FCCC/CP/1997/L.7/Add.1, 10 December 1997 (entered into force 16 February 2005) [*Kyoto*].

²⁰⁵ Marrakech Accords, Decision 24 CP.7 Procedures and mechanisms relating to compliance under the Kyoto Protocol in *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session*, U.N. Doc. FCCC/CP/2001/13/Add.3 (2002) <<http://unfccc.int/resource/docs/cop7/13a03.pdf>> [Marrakech Accords];

²⁰⁶ *Adoption of the Paris Agreement*, UN Doc. FCCC/CP/2015/L.9/Rev/1 (12 December 2015) [Paris Agreement].

²⁰⁷ *Protection of Global Climate for Present and Future Generations of Mankind*, G.A. Res. 45/212, U.N. GAOR, 45th Sess., 71st plen. mtg., Supp. No. 49, at 147-49, U.N. Doc. A/45/49 (1990); See Daniel Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18:2 Yale J Intl L 451 at 453. Online: <digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1626&context=yjil> [Bodansky].

²⁰⁸ Bodansky, *supra* note 207. The convention required fifty ratifications for entry into force. See UNFCCC, *supra* note 2.art. 23.

it at the Earth Summit.²⁰⁹ There are currently 197 parties to the convention.²¹⁰ The main objective of the UNFCCC is for the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system...”²¹¹ The Convention became necessary because of global concerns that human activities were substantially increasing the atmospheric concentrations of greenhouse gases which could result in global warming with the consequential effect of altering natural systems and, ultimately, humankind.²¹² The Convention, without setting any anthropogenic emissions target whatsoever, imposes on Parties the commitment to combat climate change based on “their common but differentiated responsibilities and their specific national and regional development priorities.”²¹³ The convention commits the developed countries to “take the lead in combating climate change and the adverse effects thereof,”²¹⁴ arguably because as at then, the developed and “industrialized countries were responsible for approximately three-quarters of global carbon dioxide emissions”²¹⁵; and “the United States alone contributed nearly one-quarter of the global total.”²¹⁶ Furthermore, in the demonstration of the leading role of the developed countries in climate change mitigation, the Convention imposes certain commitments on each of the developed countries and other Parties included in Annex I of the Convention. It provides that:

Each of these Parties **shall** adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and

²⁰⁹ Bodansky, *supra* note 207.

²¹⁰ “UN Framework Convention on Climate Change: COP 23”, online: *Intergovernmental Oceanographic Commission* <ioc-unesco.org/index.php?option=com_oe&task=viewEventRecord&eventID=2086>; as of December 2015, there were 197 parties to the Convention - 196 States and 1 regional economic integration organization.

²¹¹ *UNFCCC*, *supra* note 2 at art. 2.

²¹² *Ibid.* art. 4(2)(a).

²¹³ *Ibid.* at art. 4.

²¹⁴ *Ibid.*

²¹⁵ Bodansky, *supra* note 207 at 457.

²¹⁶ *Ibid.*

protecting and enhancing its greenhouse gas sinks and reservoirs...²¹⁷(Emphasis mine).

This commitment appears to be a legally binding one due to the use of the word “shall”. It is neither discretionary nor optional, but obligatory.

Article 7 of the Convention establishes the Conference of the Parties as the supreme body of the Convention and empowers it with the duty to regularly review the implementation of the convention and “periodically examine the obligations of the Parties amongst others.”²¹⁸ All Parties are obligated to:

Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties...²¹⁹

While it may be argued that the Convention intends to encourage a reduction in global emissions of GHGs, it does not, however, make provisions for liability and enforcement.²²⁰ There is a scholarly opinion that suggests that the absence of liability and enforcement “is a clear reflection of the prevalent view that the Convention should play a facilitative and consultative role, not a punitive one.”²²¹ Article 14 of the Convention provides a dispute resolution mechanism which is generally modelled like the dispute settlement provisions of other MEAs.²²² It provides that whenever there is a dispute between the Parties “concerning the interpretation or application

²¹⁷ *UNFCCC*, *supra* note 2 at art. 4(2)(a).

²¹⁸ *Ibid.* at art 7(a).

²¹⁹ *Ibid.* at art. 4.

²²⁰ Bodansky, *supra* note 207 at 532.

²²¹ *Ibid.*

²²² *Ibid.* at 549.

of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.”²²³ However, Parties may submit themselves to the compulsory jurisdiction of the International Court of Justice (ICJ) and/or Arbitration in resolving their disputes on the interpretation or application of the Convention.²²⁴ The trouble with this dispute resolution provision is that both Parties must agree to donate jurisdiction to the ICJ. Regarding the Arbitration mechanism, it must be in “accordance with procedures to be adopted by the Conference of the Parties.”²²⁵

4.1.1.1 Can the Inuit Seek Redress Through the Instrumentality of the UNFCCC?

The Convention provides for dispute resolution only between Parties to the Convention. The Parties include States and a regional economic integration organization. Essentially, only these Parties may ventilate their grievances using the dispute resolution mechanism within the Convention. Individuals and Groups are not Parties to the Convention, as such, they are deprived of the necessary legal standing (*locus standi*) to pursue a claim against a State or file a complaint against one or more States for their inability to implement their commitments under the Convention. Therefore, an Indigenous group like the Inuit may only pursue their cause through a State or a regional economic integration organization who is a Party to the Convention. The Country may adopt the complaints and pursue complaints on behalf of the Inuit.

²²³ UNFCCC, *supra* note 2 at art. 14 (1).

²²⁴ *Ibid.* at art.14(2)

²²⁵ *Ibid.*

4.1.2 The Kyoto Protocol

The Kyoto Protocol (Protocol) is the first Protocol under the UNFCCC. It was agreed upon in pursuance and furtherance of the objective of the UNFCCC (Convention) as stated in Article 2 of the Convention – to reduce and “stabiliz[e] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system...”²²⁶ The Protocol was adopted in Kyoto, Japan, on December 11, 1997, by over 150 nations and entered into force on February 16, 2005.²²⁷ There are currently 192 Parties to the Protocol.²²⁸ While the United States did not ratify the Protocol Canada withdrew from the Protocol on December 12, 2011.²²⁹ The Conference of the Parties (COP 7) adopted the rules for the implementation of the Protocol in Marrakesh, Morocco, in 2001 (Marrakesh Accords)²³⁰, and the first commitment of the Protocol was from 2008 to 2012. In the Doha Amendment to the Protocol, Parties agreed to a second commitment period to start on January 1, 2013, and end on December 31, 2020.²³¹ As in the Convention, the Protocol recognizes the commitments of Parties based on “their common but differentiated responsibilities and their specific national and regional development priorities.”²³² Unlike the UNFCCC, the Protocol sets binding anthropogenic emissions targets for Annex 1

²²⁶ See *UNFCCC*, *supra* note 2 at art. 2; *Kyoto*, *supra* note 204 at art. 2. The Protocol targeted the reduction in the emissions of six greenhouse gases – Carbon dioxide (CO₂) Methane (CH₄) Nitrous oxide (N₂O) Hydrofluorocarbons (HFCs) Perfluorocarbons (PFCs) Sulphur hexafluoride (SF₆) (Annex A to the Protocol).

²²⁷ “What is the Kyoto Protocol?”, online: UNCC <unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/what-is-the-kyoto-protocol> [What is the Kyoto Protocol]; “Kyoto Protocol Fast Facts” (21 March 2018), online: *CNN* <www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts/index.html> [CNN].

²²⁸ Canada withdrew from the protocol, effective December 2012.

²²⁹ <https://www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts/index.html>

²³⁰ What is the Kyoto Protocol, *supra* note 227.

²³¹ *Ibid.*

²³² *Kyoto*, *supra* note 204 at art. 10.

Parties (the developed states) and excluded Non – Annex 1 Parties (the developing states) from emissions targets.²³³ Specifically, Article 8 provides that:

The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.²³⁴

To further ensure compliance with Parties' commitments on emissions targets, the Protocol makes provisions to accommodate and encourage emissions trading among Parties.²³⁵ The Protocol established a compliance mechanism through Decision 27/CMP.1 *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*.²³⁶ The compliance mechanism comprises a facilitative branch and an enforcement branch.²³⁷ While the facilitative branch is “responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol,”²³⁸ the enforcement branch is responsible for determining Parties compliance with their commitments, and also applying the consequences for non-compliance amongst others.²³⁹ Both branches are required to “interact and

²³³ *Ibid.* at art. 2, 3. The Protocol set the following targets to be achieved within the first commitment period (2008 – 2012) - EU-15, Bulgaria, Czech Republic, Estonia, Latvia, Liechtenstein, Lithuania, Monaco, Romania, Slovakia, Slovenia, Switzerland - -8%, US -7%, Canada, Hungary, Japan, Poland -6%, Croatia -5%, New Zealand, Italy, Federation, Ukraine 0, Norway +1%, Australia +8%, and Iceland +10%. See Kyoto Protocol, “Targets for the First Commitment Period”, online: UNFCCC <unfccc.int/process/the-kyoto-protocol>.

²³⁴ *Kyoto*, *supra* note 204 at art. 3(1).

²³⁵ *Ibid.* at art. 6.

²³⁶ Decision 27/CMP.1 Procedures and mechanisms relating to Compliance under the Kyoto Protocol, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 <unfccc.int/files/kyoto_protocol/compliance/application/pdf/dec.27_cmp.1.pdf>. [Decision 27].

²³⁷ *Ibid.*

²³⁸ *Ibid.* at IV.

²³⁹ *Ibid.* at V.

cooperate in their functioning.”²⁴⁰ The consequences for non-compliance with Parties’ commitments, essentially, includes a declaration of non-compliance²⁴¹, and suspension of the party from being eligible to participate in the emissions trading.²⁴² The non-compliant Party is required to submit to the enforcement branch within three months of being declared non-compliant or any more extended period of time considered appropriate by the enforcement branch “(a) An analysis of the causes of non-compliance of the Party; (b) Measures that the Party intends to implement in order to remedy the noncompliance; and (c) A timetable for implementing such measures within a time frame not exceeding twelve months which enables the assessment of progress in the implementation.”²⁴³ It should be noted that the above-mentioned plan submitted is only to be reviewed and assessed by the enforcement branch; the branch is not empowered to “approve” the plan.²⁴⁴

Where a Party is considered to have exceeded its emissions limit or “assigned amount”, the enforcement branch is mandated to “deduct from the Party’s assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions”²⁴⁵, and suspend the party from being eligible to participate in emissions trading until reinstated by the enforcement branch.²⁴⁶ Some scholars have expressed their view that the disadvantage of the deduction of excess emissions from a party's future emissions is that the defaulting party “would in fact simply "borrow" from commitment period to commitment period,

²⁴⁰ *Ibid.* at II.

²⁴¹ *Ibid.* at XV.

²⁴² *Ibid.* at XV 5(c).

²⁴³ *Ibid.* at XV.

²⁴⁴ Xeuman Wang & Glenn Wiser, the Implementation and Compliance Regimes Under the Climate Change Convention and Its Kyoto Protocol” (2002) 11 RECIEL 181, 196-197 <www.law.uh.edu/faculty/thester/courses/Climate-Change-2018/Compliance%20%20Dispute%20Settlement.pdf>.

²⁴⁵ Decision 27, *supra* note 236 at XV 5.

²⁴⁶ *Ibid.*

in the same way that someone might pass on debt indefinitely into the future until the system was forced to accept that the debt would never be repaid.”²⁴⁷

4.1.2.1 The Kyoto Protocol Post 2012

The first commitment period of the Protocol ended in 2012. Given this, the Conference of the Parties at its Eight Session in Doha, Qatar adopted an amendment to the Kyoto Protocol (Decision 1/CMP.8)²⁴⁸ on December 8, 2012, to commence a second commitment period from January 1, 2013 and end on December 31, 2020.²⁴⁹ The amendment requires 144 instruments of acceptance to enter into force.²⁵⁰ Currently, the amendment is yet to enter into force as only 126 parties have accepted the amendment.²⁵¹

4.1.2.2 Can the Inuit Seek Redress Through the Instrumentality of the Kyoto Protocol?

The Protocol adopts the entire dispute resolution mechanism under the UNFCCC.²⁵² As such, like the Convention, Parties may settle disputes amicably or submit themselves to the ICJ or Arbitration in dispute settlement. The Protocol also allows Parties or the Compliance Committee to commence the non-compliance process against a non-complaint Party.²⁵³ However, the process does not accommodate complaints from individuals or groups like the Inuit. One would have

²⁴⁷ *Ibid.*

²⁴⁸ COP, Decision 1/CMP.8 Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment), U.N. Doc. FCCC/KP/CMP/2012/13/Add.1.

unfccc.int/resource/docs/2012/cmp8/eng/13a01.pdf#page=2. [Doha Amendment]

²⁴⁹ What is the Kyoto Protocol, *supra* note 227.

²⁵⁰ Doha Amendment, *supra* note 248.

²⁵¹ *Ibid.*; As of 21 February 2019, 126 Parties have deposited their instrument of acceptance.

²⁵² *Kyoto*, *supra* note 204 at art. 19.

²⁵³ Anita Halvorssen & Jon Hovi, “The Nature, Origin and Impact of Legally Binding Consequences: the Case of the Climate Regime” (2006) 6 J. Int’l Envtl. Agr. Pol. L. & Econ. 157 at 161 [Halvorssen & Hovi].; See Meghan, *supra* note 73.

argued that the complaint could be brought to the forum by Canada, but Canada is no longer a Party to the Protocol, and as such, it has lost its legal standing. Furthermore, an action cannot be initiated against the United States because it is not a Party to the Protocol.

4.1.3 The Paris Agreement

The Paris Agreement²⁵⁴ is the most recent and ambitious global effort which aims to reduce global temperature and the distressing impacts of climate change. The Paris Agreement was made in furtherance of the goals of the UNFCCC. It was adopted at the 21st Conference of the Parties (COP 21) in Paris on December 12, 2015, and, as required by Article 21 of the Paris Agreement,²⁵⁵ the agreement came into effect on November 4, 2016²⁵⁶, “thirty days after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession with the Depositary.”²⁵⁷ As of today, the agreement has been ratified by 185 Parties out of the 197 Parties to the UNFCCC.²⁵⁸ The main objective of the Paris Agreement is “to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.”²⁵⁹ The agreement requires Parties to voluntarily develop and submit their nationally determined contributions (NDCs) for the reduction

²⁵⁴ Paris Agreement, *supra* note 206.

²⁵⁵ “What is the Paris Agreement?” online: United Nations Climate Change <unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> [What is the Paris Agreement]; See Paris Agreement, Paris Agreement, *supra* note 203 art. 21.

²⁵⁶ What is the Paris Agreement, *supra* note 255.

²⁵⁷ *Ibid.*

²⁵⁸ “Paris Agreement – Status of Ratification”, online: <unfccc.int/process/the-paris-agreement/status-of-ratification>.

²⁵⁹ Paris Agreement, *supra* note 206; see What is the Paris Agreement, *supra* note 255.

of greenhouse gases emissions.²⁶⁰ It encourages developed country Parties to take the lead in the global emissions target.²⁶¹ Article 3 of the Agreement provides that “[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts...”²⁶² The Paris Agreement creates a binding obligation for the Parties to maintain their NDCs and also pursue domestic mitigation measures. Article 4 (2) of the Agreement provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”²⁶³ The agreement is devoid of any legally binding emissions target and also lacks the necessary enforcement mechanism to ensure Parties’ compliance with their commitments (NDCs).²⁶⁴ Furthermore, the failure of a Party to comply with its target does not attract any consequence under the Agreement. The Agreement is considered to be “a hybrid of legally binding and nonbinding provisions.”²⁶⁵ Some of the provisions create binding obligations while some do not. There are several views on whether or not the agreement qualifies as a treaty. A scholar has argued that the Agreement is not a treaty but “‘essentially a statement of good intentions’ rather than law”²⁶⁶

²⁶⁰ Paris Agreement, *supra* note 206 at art. 4(2).

²⁶¹ *Ibid.* at art. 4(4).

²⁶² *Ibid.* at art. 3.

²⁶³ *Ibid.* at art. 4(2).

²⁶⁴ Timmons Roberts & Angelica Arellano, “Is the Paris climate deal legally binding or not?”, online: *Climate Home News* <www.climatechangenews.com/2017/11/02/paris-climate-deal-legally-binding-not/>; According to Janos Pasztor, the former U.N. Assistant Secretary-General on Climate Change, “Whatever they commit to is not legally binding but they have to report ... it is not name and shame, it is name and encourage. See Daniel Bodansky, “The Legal Character of the Paris Agreement” (2016) 25:2 RECIEL142-150 [Daniel Bodansky]. According to Daniel Bodansky, “generally, the agreement lacks enforcement machinery and it is not necessarily justiceable” – Daniel Bodansky.

²⁶⁵ “The Paris Agreement: Frequently Asked Questions”, online: *UN SDGs* <www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs/>

²⁶⁶ Anne-Marie Slaughter, former president of the American Society of International Law. See Daniel Bodansky, *supra* note 264; See A.-M. Slaughter, ‘The Paris Approach to Global Governance’, Project-Syndicate (28 December 2015), online: www.project-syndicate.org/commentary/paris-agreement-model-for-global-governance-by-anne-marie-slaughter-2015-12.

because it lacks “‘enforceable rules’ with ‘sanctions for non-compliance’”²⁶⁷, and non-domestication by some Parties to enable it to become a domestic law.²⁶⁸ Another Scholar argues that the Paris Agreement is only voluntary because there is no compliance obligation.²⁶⁹ Professor Daniel Bodansky opines that the agreement “qualif[ies] as a treaty within the meaning of international law; it does create legal obligations for its parties; and compliance with these obligations is not voluntary.”²⁷⁰

The Agreement provides for climate finance, adaptation, loss and damage, transparency²⁷¹, and accountability through its global stock-taking requirement among others. The Conference of the Parties is required to take stock in order to assess the progress made in achieving the goals of the Agreement. The first global stock-take will be done in 2023 and every five years thereafter.²⁷² Article 14 (1) provides that:

The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.²⁷³

While the Paris agreement urges the developed countries to continue to make climate finance available to the developing country Parties²⁷⁴, it also provides for loss and damage.

²⁶⁷ Daniel Bodansky, *supra* note 264.

²⁶⁸ *Ibid.*

²⁶⁹ R. Falk, ‘Voluntary International Law and the Paris Agreement’ (16 January 2016), online: <https://richardfalk.wordpress.com/2016/01/16/voluntary-international-law-and-the-paris-agreement/>; See Daniel Bodansky, *supra* note 264.

²⁷⁰ Daniel Bodansky, *supra* note 264.

²⁷¹ Paris Agreement, *supra* note 206 at art. 13.

²⁷² *Ibid.* at art. 14(2).

²⁷³ *Ibid.* at art. 14(1).

²⁷⁴ *Ibid.* at art. 9.

Although this provision is very significant to regions that are extremely affected by climate change, it does not create legal liability for countries that have contributed to climate change by their inability to take actions to reduce their emissions. Article 8(1) provides that: “Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.”²⁷⁵ Article 8(3) further urges Parties to “enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.”²⁷⁶ The Paris Agreement, like the Kyoto Protocol, adopts the entire dispute resolution mechanism under the UNFCCC.²⁷⁷

While countries of the world continue to agree upon reducing greenhouse gas emissions and also taking actions on climate change mitigation measures, the intended withdrawal of the United States of America from the Paris Agreement has brought many uncertainties and anxieties. The President of the United States of America, Donald Trump, declared his intention to withdraw the involvement of the United States of America from the Paris Agreement on June 1, 2017.²⁷⁸ Before this declaration, he had taken deliberate actions geared towards frustrating the commitments of President Obama’s administration to reduce the emissions of greenhouse gases. On March 28, 2017, he signed an Executive Order²⁷⁹ mandating the United States’ “Environmental Protection Agency (EPA) to review and potentially suspend, revise, or rescind Clean Air Act rules

²⁷⁵ *Ibid.* at art. 8(1)

²⁷⁶ *Ibid.* at art. 8(3)

²⁷⁷ *Ibid.* at art. 24.

²⁷⁸ The White House, “Statement by President Trump on the Paris Climate Accord”, (1 June 2017), online: <www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>.

²⁷⁹ The White House, “Presidential Executive Order on Promoting Energy Independence and Economic Growth”, (28 March 2017), online: <www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> [Executive Order].

for the control of power plant greenhouse gas emissions.”²⁸⁰ The United States submitted a formal notification of its intention to withdraw its participation in the Paris Agreement to the United Nations on August 4, 2017.²⁸¹ This was done in accordance with the guideline set out in Article 28 of the Paris Agreement.²⁸² Under Article 28, there are two options available to a Party who desires to withdraw. The first option is by giving written notification to the Secretary-General of the United Nations.²⁸³ A party would be able to withdraw from the Agreement “at any time after three years from the date on which this Agreement has entered into force for a Party”²⁸⁴ and “such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.”²⁸⁵ The second option is captured under Article 28 (3) of the Paris Agreement. This option makes the withdrawal from the *United Nations Framework Convention on Climate Change* tantamount to the withdrawal from the Paris Agreement.²⁸⁶ The United States, in its bid to withdraw from the Paris Agreement, chose the first option. As such, the withdrawal of the United States “becomes effective on November 4, 2020, the day after the next U.S. presidential election.”²⁸⁷ It, therefore, goes without saying that the United States remains a party to the Paris Agreement and as such is “obligat[ed] to comply with its commitments under the agreement.”²⁸⁸

²⁸⁰ Utzinger, Thomas A., “Trump Administration Climate Policy and the Paris Agreement: Mitigating Factors will Continue Emissions Reductions” (2017) 20:5 Air Quality Committee Newsletter at 3-8 [Utzinger].

²⁸¹ United States, ‘Communication Regarding Intent to Withdraw from Paris Agreement’ (4 August 2017), online: <<https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>> [Intent to Withdraw]

²⁸² Paris Agreement, *supra* note 206 at art. 28.

²⁸³ *Ibid* at art. 28(1).

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*. at art. 28(2).

²⁸⁶ *Ibid*. at art. 28(3).

²⁸⁷ Utzinger, *supra* note 280.

²⁸⁸ Daniel Bodansky, “Sound and Fury on the Paris Agreement – But Does It Signify Anything?” *Opinio Juris* (2 June 2017) online: <[opiniojuris.org/2017/06/02/33147/](https://www.opiniojuris.org/2017/06/02/33147/)> [Bodansky 3].

One of the many concerns flowing from the withdrawal of the United States from the Paris Agreement is that the essence of the agreement may be jeopardized especially in view of the intention of President Donald Trump to rescind the United States' Climate Action Plan and also scuttle the Clean Power Plan.²⁸⁹ It is noteworthy that the agreement was negotiated to ensure the commitment and participation of the United States in the global efforts to address climate change.²⁹⁰ This was important in order to avoid a repetition of the fate which befell the Kyoto Protocol. The uncertainties regarding the future political leadership in the United States at the period of negotiating the Paris Agreement must have informed the decision of Parties to make it difficult for a Party to withdraw from the agreement, and also the decision to make it easy for a Party to rejoin the agreement. By virtue of Article 21(3) of the Paris Agreement, a State can rejoin the agreement after thirty days of submitting to the United Nations its intention to rejoin.²⁹¹

The United States is notorious for being the world's second largest emitter of greenhouse gases as it contributes 14.36% to global emissions.²⁹² This emphasizes the importance of the participation of the United States in the Paris Agreement. It has been argued that the withdrawal of the United States may frustrate the possibility of achieving the objectives of the Paris Agreement.²⁹³ Furthermore, there is a popular view that "the withdrawal undercuts the foundation of global climate governance and upsets the process of global climate cooperation."²⁹⁴

²⁸⁹ Michael Greshko, "The Global Dangers of Trump's Climate Denial", *National Geographic* (9 November 2016), online: <<https://news.nationalgeographic.com/2016/11/president-trump-global-climate-change-denial-environment/>>.

²⁹⁰ Chandra Bhushan, "Why the US should quit the Paris Agreement", *DownToEarth* (12 December 2015), online: <<http://www.downtoearth.org.in/news/why-the-us-should-quit-the-paris-agreement-56473>>.

²⁹¹ Paris Agreement, *supra* note 206 at art. 21 (3). See Brian Palmer, "Is America Actually Out of the Paris Agreement?", online: NRDC <<https://www.nrdc.org/stories/america-actually-out-paris-agreement>>

²⁹² Johannes Friedrich, Mengpin Ge & Andrew Pickens, "This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed" online: World Resources Institute <www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed> [Friedrich].

²⁹³ Zhang Hai-Bin et al, "U.S. withdrawal from the Paris Agreement: Reasons, impacts, and China's response", online: ScienceDirect <<http://www.sciencedirect.com/science/article/pii/S1674927817301028>> [Zhang]

²⁹⁴ *Ibid.* at 1.

4.1.3.1 The Paris Agreement Recognizes the Right of the Indigenous Peoples

Unlike the Kyoto Protocol which did not make any references to the Indigenous peoples, the Paris Agreement makes several references to Indigenous peoples and affirms the need to recognize and respect their rights. Although the right of the Indigenous peoples is not mentioned under the binding principles or provisions of the agreement, the preamble of the Agreement urges Parties to be mindful of their obligations to the rights of the indigenous peoples in addressing climate change. The Preamble provides as follows: “acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of [I]ndigenous peoples...”²⁹⁵

4.1.3.2 Can the Inuit Seek Redress Through the Instrumentality of the Paris Agreement?

Article 15 of the Paris Agreement provides for a mechanism to ensure the implementation of Parties’ commitments and compliance with the Agreement. This mechanism could be explored by Parties to submit and resolve claims.²⁹⁶ However, this mechanism is neither adversarial nor punitive. Article 15 provides as follows:

1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.
2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular

²⁹⁵ Paris Agreement, *supra* note 206 at preamble.

²⁹⁶ *Ibid.* at art. 15.

attention to the respective national capabilities and circumstances of Parties.²⁹⁷

The Agreement, like the Kyoto Protocol, adopts the entire dispute settlement mechanism under the UNFCCC.²⁹⁸ As such, like the Convention, Parties may settle disputes amicably or submit themselves to the ICJ or Arbitration in dispute settlement. This process does not accommodate complaints from individuals or groups like the Inuit. The Inuit may, however, explore the possibility of bringing their complaints against a Party who has refused to perform its obligation under the Agreement through another Party like Canada.

4.1.4 Conclusion

The current global regimes on climate change discussed above appear to lack adequate mechanisms or platforms for the Inuit to seek redress to defend their ecosystem (environment), culture, and way of life. However, there exist principles of international law, and mechanisms within the United Nation's human rights system and Inter-American human rights system that may provide the necessary forums to accommodate the complaints of the Inuit and also help them in seeking recourse against states for their refusal to take actions to reduce their contributions to climate change. These mechanisms will be discussed in Chapter Five.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* at art. 24.

CHAPTER FIVE

CLIMATE CHANGE AND THE INUIT: THE SEARCH FOR LEGAL AND REGULATORY REMEDIES

The previous chapters of this thesis have addressed the fundamental rights of the Indigenous peoples, the nexus between the human rights and environmental rights of the Indigenous peoples, the observed impact of climate change in the Arctic, and the current regimes and frameworks on climate change within the United Nations system and their significance or otherwise to the Inuit in their search for legal remedies. After these chapters, the following are now very well settled: 1. that the Inuit, by virtue of their status as human beings and Indigenous peoples are entitled to fundamental rights, freedoms, and environmental rights which are inalienable. 2. That there is a strong connection between the human rights of the Inuit and their environmental rights. 3. That there is clear and uncontroverted evidence that the Inuit and their region have been negatively impacted by climate change. and that their region is the most adversely affected region on earth. 4. That the Indigenous communities are not responsible for the change in climate and its attendant predicaments, rather, the change in climate is a direct result of the indiscriminate emissions of GHGs by countries and corporate bodies, and the refusal of these countries to reduce their emissions and also respect their obligations under climate change treaties and international law system. 5. That the fundamental rights of the indigenous communities and particularly the Inuit have been and continue to be violated by the refusal of states to reduce their GHG emissions that contribute to climate change and also respect their obligations under the climate change treaties and international law. It is also settled that the current climate change treaties do not provide effective mechanisms or platforms for the Inuit to seek redress to defend

their ecosystem (environment), culture, and way of life. However, what remains unaddressed is whether there are legal and regulatory remedies for the violations of the rights of the Inuit. This chapter will interrogate relevant human rights systems – the United Nations human rights system and the regional human rights system, and the existing principles of international law that may provide necessary mechanisms to accommodate the complaints of the Inuit and also help them in seeking recourse against states for their refusal to take actions to reduce their contributions to Climate Change. This chapter also addresses the Inuit’s case against the United States, and concludes that there are effective remedies under UN human rights system and also under the Inter-American human rights system for the Inuit’s human right claims against the United States.

5.1 The United Nations Human Rights System

It is now beyond doubt that the existing climate change regimes and “traditional” international environmental laws do not provide effective mechanisms for the Inuit to seek redress to defend their ecosystem. The State-centric nature of these climate change regimes and international environmental laws has prevented individuals and groups like the Inuit from seeking redress against states that have failed and refused to take actions to reduce their GHG emissions and contributions to climate change.²⁹⁹ This reality has prompted the need to explore the United Nations human rights system in order to provide effective legal remedies to the Inuit. Moreover, the close link between environmental damages and human rights abuses³⁰⁰ has made the intervention of the United Nations human rights system desirable. The United Nations human

²⁹⁹ See Meghan, *supra* note 73.

³⁰⁰ Caroline Dommen, “Claiming Environmental Rights: Some Possibilities Offered by The United Nations’ Human Rights Mechanisms” (1998-1999) 11 Geo. Int’l. Env’tl. L. Rev. 1 at 30 [Dommen]; See Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception” (1996) 45 Int’l & Comp. L.Q. 796

rights system comprises a variety of mechanisms for the promotion and protection of human rights and also for monitoring compliance with the human rights treaties and instruments under the United Nations system. These mechanisms are categorized under two major UN human rights bodies: charter-based bodies and treaty-based bodies. The UN charter-based bodies derive their establishment, validity, and continued existence from the provisions of the *Charter of the United Nations* (UN Charter), while the treaty-based bodies derive their existence and validity from provisions of specific UN legal instruments.³⁰¹ These two major UN human rights bodies will be addressed below under separate sub-headings.

5.1.1 The UN Charter-Based Bodies

The UN charter-based bodies are charged with human rights mandates, among which includes the promotion and enforcement of human rights. The UN charter-based bodies include the Human Rights Council and its subsidiary bodies. The Human Rights Council (HRC) replaced the Commission on Human Rights in 2006. The subsidiary bodies of the HRC include the Universal Periodic Review Working Group, the Human Rights Council Advisory Committee, and the special procedures.³⁰² There is also the Human Rights Council Complaint Procedure. Prior to the HRC, there existed the Commission on Human Rights (CHR). It was established in 1946 by the UN Economic and Social Council (ECOSOC).³⁰³ The CHR was a functional commission and a major UN mechanism which was vested with the mandate to promote and protect human

³⁰¹“UN Documentation: Human Rights”, online: *Dag Hammarskjöld Library* <research.un.org/en/docs/humanrights/charter>.

³⁰²“Human Rights Council Subsidiary Bodies”, online: *United Nations Human Right Council* <www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx>.

³⁰³“Introduction”, online: *United Nations Human Right Council* <www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx>. [Introduction].

rights.³⁰⁴ Essentially, the CHR procedures were “mandated to examine, monitor and publicly report either on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates).³⁰⁵ These mechanisms, or mandates, formed the special procedures of the CHR.³⁰⁶ The CHR was composed of 53 member states and also served as an international forum where countries, non-governmental organizations (NGOs) and interest groups aired their grievances and human rights concerns.³⁰⁷ In 1947, the CHR established the Sub-Commission on Prevention of Discrimination and Protection of Minorities to assist in its work and “to make recommendations concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities, and to carry out any other functions which may be entrusted to it”³⁰⁸ The ECOSOC changed the name of the Sub-Commission to “Sub-Commission on the Promotion and Protection of Human Rights” (‘Sub-Commission’) in 1999.³⁰⁹ The Sub-Commission was composed of 26 independent experts in the field of human rights. The CHR and the Sub-Commission also dealt with environmental issues as these issues were raised either directly or indirectly.³¹⁰ Furthermore, the Sub-Commission recognized the place of Indigenous Peoples’ rights “because of the close link between land and resources on the one hand and indigenous identities, lifestyles and

³⁰⁴ Dommen, *supra* note 300 at 31.

³⁰⁵ “Background Information” online: *United Nations Human Right Council* <www.ohchr.org/EN/HRBodies/CHR/Pages/Background.aspx>.

³⁰⁶ *Ibid.*

³⁰⁷ Introduction, *supra* note 303.

³⁰⁸ “Sub-Commission on the Promotion and Protection of Human Rights”, online: *United Nations Human Right Council* <www.ohchr.org/EN/HRBodies/SC/Pages/SubCommission.aspx> [Sub-Commission]; see Dommen, *supra* note 300 at 31.

³⁰⁹ See Sub-Commission, *supra* note 308.

³¹⁰ Dommen, *supra* note 300 at 33.

cultures on the other.”³¹¹ Additionally, the Commission considered environmental issues arising from countries such as Burma, Tibet, Nigeria, Ecuador, and Peru.³¹²

The Human Rights Council (HRC) replaced the Commission on Human Rights in 2006 pursuant to General Assembly resolution 60/251 of 15 March 2006 and also assumed all its mandates, mechanisms, functions, and the Sub-Commission on the Promotion and Protection of Human Rights.³¹³ The HRC is “responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.”³¹⁴ While the Universal Periodic Review is a mechanism within the HRC which is responsible for assessing the human rights situations in all United Nations Member States, the HRC Advisory Committee provides the HRC with advice on human rights issues.³¹⁵ The Complaint Procedure of the HRC allows individuals, groups, and organizations to bring human rights violations to the HRC.³¹⁶ The HRC has over the years made some strides in the areas of human rights and climate change, and human rights and the environment. In March 2012, the HRC established a mandate on human rights and the environment to “study human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking.”³¹⁷ Mr. John Knox was appointed as the Independent Expert between 2012 – 2015 and as the Special

³¹¹See *Human Rights and the Environment: Final Report Prepared by Ms. Fatma Zohra Ksentini*, 86, U.N. Doc. E/CN.4/Sub.2.1/1994/9 (1994) [Ksentini Report]. See also Neil A. F Popovic, “In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment” (1996) 27 COLUM. HUM. RTS. L. REV. 487, 541, 594

³¹² Dommen, *supra* note 300 at 33.

³¹³ *Human Rights Council*, GA Res. 60/251, UNGAOR, 60th Sess., UN Doc. A/60/L.48 (2006); see also Sub-Commission, *supra* note 308.

³¹⁴ “Welcome to the Human Rights Council”, online: *United Nations Human Rights Council* <www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx>.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ “Special Rapporteur on human rights and the environment”, online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

Rapporteur on human rights and the environment between 2015 – 2018.³¹⁸ During the term of Mr. Knox, several resolutions were adopted, and a report on *Framework Principles on Human Rights and the Environment* was submitted to the 37th session of the HRC.³¹⁹ This report proposed sixteen framework principles. Framework principle No.1 provides that “States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.”³²⁰ Framework principle No.8 states that “to avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.”³²¹ Also, Framework principle No.15 provides that “States should ensure that they comply with their obligations to [I]ndigenous peoples and members of traditional communities, including by: (a) [r]ecognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used; ...”³²²

“The HRC, its special procedures mechanisms, and the Office of the High Commissioner for Human Rights have sought to bring renewed attention to human rights and climate change through a series of resolutions, reports, and activities on the subject, and by advocating for a human rights-based approach to climate change.”³²³ In Resolutions 16/11, 19/10, 25/21 and 28/11, the

³¹⁸ *Ibid.* The HRC appointed Mr. David. R. Boyd as the Special Rapporteur on human rights and the environment in March 2018.

³¹⁹ Knox, John H., *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles* (January 24, 2018). United Nations Human Rights Council, UN Doc. A/HRC/37/59 <documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/42/PDF/G1801742.pdf?OpenElement>.

³²⁰ *Ibid.* at principle No.1

³²¹ *Ibid.* at principle No.8.

³²² *Ibid.* at principle No.15.

³²³ “Human Rights and Climate Change”, online: *United Nations Human Right Council* <www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>.

Human Rights Council has recognized that the impact of climate change on the full enjoyment of human rights is a global problem that requires a global solution.³²⁴

5.1.1.1. The Human Rights Council Complaint Procedure

The HRC adopted resolution 5/1 on June 18, 2007. This resolution introduced a new HRC Complaint Procedure to replace a former complaint procedure known as “procedure 1503”. The Complaint Procedure is a confidential procedure “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.”³²⁵ The Complaint Procedure is noted to be victim-oriented and is to be conducted in a timely manner.³²⁶ The Procedure allows individuals, groups like the Inuit, or non-governmental organizations that claim to be victims of human rights violations to submit a complaint against any member states of the United Nations and countries regardless of whether the countries have ratified any UN treaties or instruments. There are two working groups that have significant roles in the HRC Complaint Procedure - the Working Group on Communications and the and the Working Group on Situations. While the Working Group on Communications examines written communications or complaints, the Working Group on Situations brings consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms to the attention of the HRC.³²⁷ It merits mention that there are some criteria for the admissibility of the complaints. One of the requirements is that the object of the complaint

³²⁴ “Understanding Human Rights and Climate Change”, Submission of the *Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change* < www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

³²⁵ “Human Rights Council Complaint Procedure”, online: *United Nations Human Right Council* <www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> [Complaint Procedure].

³²⁶“ Complaint Procedure of the Human Rights Council: Frequently Asked Questions”, <https://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/FAQComplaintProcedure_en.pdf>

³²⁷ *Ibid.*

must be consistent with the *Charter of the United Nations*, the *Universal Declaration of Human Rights* (UDHR), and other instruments relating to human rights. Also, the complaint must disclose the alleged violations and the rights which have been allegedly violated. Furthermore, the complaint has not already been dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights; and that the complainants have explored and exhausted domestic remedies unless it appears that such remedies would be ineffective or unreasonably prolonged.³²⁸

This Complaint Procedure is available to the Inuit and may provide an effective mechanism for them to make complaints against states for the violations of their fundamental rights for the refusal to take actions to reduce contributions to Climate Change. The Inuit's complaints, however, must disclose the alleged violations and the rights which have been allegedly violated among others.

5.1.2 The UN Treaty-Based Bodies

The human rights mechanisms created treaties under the United Nations system are generally seen as legal mechanisms, while the human rights mechanisms created by the United Nations Charter and the Universal Declaration of Human Rights (UDHR) are seen as political mechanisms.³²⁹ The UN treaty-based bodies are bodies established to monitor and oversee the implementation of the provisions of the treaties.³³⁰ They are mandated to monitor State parties' compliance with their treaty obligation.³³¹ They are committees composed of independent experts

³²⁸ Complaint Procedure, *supra* note 325.

³²⁹ Dommen, *supra* note 300 at 7.

³³⁰ "UN Documentation: Human Rights", online: *Dag Hammarskjöld Library* <research.un.org/en/docs/humanrights/treaties>

³³¹ "Human Rights Bodies" online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>>.

who consider reports from states and complaints or communications from individuals. Currently, there are nine core international human rights treaties and one Optional Protocol to the Convention against Torture.³³² These human rights treaties created ten treaty bodies that are composed of independent experts in the field of human rights who are elected by state parties for a fixed renewable term of four years.³³³ The international human rights treaties include, but are not limited to, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)³³⁴, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³³⁵, the *International Covenant on Civil and Political Rights* (ICCPR)³³⁶ and its *Optional Protocols*³³⁷, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)³³⁸, and the *Convention on the Rights of the Child* (CRC).³³⁹ Of the bodies created by these treaties, four of them are relevant to the conversations on environmental human rights.³⁴⁰ They are the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Rights of the Child, and the Committee on the Elimination of Racial Discrimination (CERD).³⁴¹ The common feature of these four bodies for monitoring compliance

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ ICERD, *supra* note 121.

³³⁵ ICESCR, *supra* note 51.

³³⁶ ICCPR, *supra* note 50.

³³⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A /6316 (1966), (entered into force March 23, 1976) [“ICCPR O P-1”]; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A /44/49 (1989), (entered into force July 11, 1991) [“ICCPR-OP2”].

³³⁸ CEDAW, *supra* note 122.

³³⁹ CRC, *supra* note 114.

³⁴⁰ See Dommen, *supra* note 300 at 7; Patrick Ryan Hamilton, *Human Rights at the Boiling Point Human Rights, the Environment and Climate Change in International Law* (LLM Thesis, University of Toronto, Faculty of Law, 2006) at 22, 23 [unpublished] [Hamilton]; See Meinhard Doelle, *From Hot Air to Action?: Climate Change, Compliance and the Future of International Environmental Law*, (Toronto: Thompson Carswell, 2005) at 222 [Doelle]; Meghan, *supra* note 73 at 74.

³⁴¹ *Ibid.*

with the treaty regimes is the state reporting feature.³⁴² These bodies receive and examine periodic reports submitted by states. Another common feature is that they all adopt “General Comments”, “which are “authoritative interpretations of the general obligations and rights embodied in the different treaties,” some of which have addressed environmental issues.”³⁴³ Furthermore, three of these bodies, namely the HR Committee, the CESCR and the CERD, have complaints procedures.³⁴⁴

(a) Human Rights Committee

The Human Rights Committee was established pursuant to Article 28 of the Covenant on Civil and Political Rights. It is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights and its optional protocols. States that are parties to this treaty are all required to submit periodic reports to the committee on their implementation of the rights provided for by the treaty. The committee considers these reports and communicates its concerns and recommendations to the state through its “concluding observations”. Furthermore, the committee is empowered to receive and consider inter-state complaints. This means that state parties can submit complaints against other state parties for violations of their obligations under the relevant treaties. Article 41 of the ICCPR empowers the Committee to consider inter-state complaints.³⁴⁵ For the first time, in 2018, the committee received three inter-state complaints³⁴⁶ submitted under Article 11 of the Convention on the

³⁴² *Ibid.*

³⁴³ Hamilton, *supra* note 340; Dommen, *supra* note 300 at 7.

³⁴⁴ Dommen, *supra* note 300 at 110; Doelle, *supra* note 340 at 222.

³⁴⁵ ICCPR, *supra* note 51 at art. 41.

³⁴⁶ *State of Qatar vs. Kingdom of Saudi Arabia, State of Qatar vs. United Arab Emirates, State of Palestine vs. State of Israel*. See “Inter-State Communications”, online: *United Nations Human Rights Office of the High Commissioner* <<https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx>>.

Elimination of All Forms of Discrimination.³⁴⁷ It should, however, be noted that the inter-state complaints procedure is only available to States that have acceded to the competence of the committee to consider their complaints.³⁴⁸ In addition to the inter-state complaints procedure, there is the individual complaints procedure. The treaty bodies may receive and consider complaints submitted by an individual. For instance, the First Optional Protocol to the ICCPR empowers the committee to receive and examine individual complaints regarding violations of the covenant by State parties. The individual complaints mechanism is particularly significant to the Inuit in that it allows them to submit environmental human rights claims to the Committee. Essentially, the Inuit may submit a complaint against states for the violation of their rights and obligations under the Covenant. However, they must have exhausted all domestic remedies in order for the Human Rights Committee to consider their complaints.³⁴⁹ Also, complaints may only be submitted against states that have acceded to the Protocol.

The Human Rights Committee has, over time, considered environmental-related cases particularly regarding: “(1) practices that affect the environment on which indigenous groups depend for survival, and (2) nuclear weapons and radioactive materials.”³⁵⁰ The Human Rights Committee in 1994 adopted a "General Comment" on Article 27 of the ICCPR, in relation to minority rights.³⁵¹ It noted in the “General Comment” that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case

³⁴⁷ *Ibid.*

³⁴⁸ “Human Rights Bodies - Complaints Procedures” online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.

³⁴⁹ *ICCPR OP I*, *supra* note 337 at arts. 2 and 5.

³⁵⁰ Dommen, *supra* note 300 at 24.

³⁵¹ *Ibid. General Comment No. 23: The Rights of Minorities*, U.N. CCPR Human Rights Committee, 50th Sess., 1314th Mtg., U.N. Doc. CCPR/C/21/Rev. 1/Add.5 (1994), <<http://www.austlii.edu.au/ahric/hrcommn/gencomm/index.html>> [General Comment No. 23]

of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."³⁵² The Human Rights Committee has also invoked the provision of Article 27 of the ICCPR to protect the culture of the Indigenous peoples. A typical instance of this is the case of *Bernard Ominayak & The Lubicon Lake Band v. Canada*.³⁵³ In this case, "the applicants alleged that the government of the province of Alberta had deprived the Lake Lubicon Indians of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands."³⁵⁴ The Committee "found that certain more recent developments, including oil and gas exploration, were threatening the way of life and culture of the Lake Lubicon Band and were thus violating minority rights, contrary to Article 27 of the ICCPR."³⁵⁵

The Human Rights Committee has also considered cases relating to nuclear weapons and radioactive materials which raised environmental issues.³⁵⁶ For instance, in a General Comment on the right to life, the Human Rights Committee stated, in light of the development of nuclear weapons, that "it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life which confront mankind today."³⁵⁷ In *E.H.P. v. Canada*³⁵⁸, the Human Rights Committee received a communication from a group of Canadians alleging a threat to the right of life of present and future generations due to

³⁵² General Comment No. 23, *supra* note 351. See Meghan, *supra* note 73 at 76.

³⁵³ *Bernard Ominayak and the Lubicon Lake Band v. Canada*, U.N. Human Rights Committee, Communication No. 167/1984, U.N. Doc. CCPR/C/38D/167/1984 (26 March 1990); See Meghan, *supra* note 73 at 77.

³⁵⁴ Dommen, *supra* note 300 at 24.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.* at 26.

³⁵⁷ *General Comment 14 [23]*, adopted Nov. 2, 1984, reprinted in Manfred Nowak, *The UN Covenant on Civil and Political Rights*, CCPR Commentary 861 (N.P. Engel Ed., 1993). See Dommen, *supra* note 300 at 26.

³⁵⁸ Communication No. 67/1980, U.N. Human Rights Committee (27 October 1982). See Meghan, *supra* note 73 at 77.

the storage waste near their homes. Although the Committee declared the case inadmissible due to failure of the applicants to explore and exhaust domestic remedies, it noted that the case raised legitimate and serious environmental issues and issues regarding the obligation of States to protect the right to life.³⁵⁹

The Human Rights Committee may be able to accommodate the Inuit's complaints against states in view of the fact that climate change has implicated some of the rights provided for in the ICCPR.

(b) U.N. Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) supervises the implementation of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol. The Committee was established pursuant to ECOSOC Resolution 1985/17 of 28 May 1985.³⁶⁰ States that are parties to this treaty are all obligated to submit regular reports to the committee on their implementation of the rights provided for by the treaty. States are mandated to submit an initial report to the Committee within two years of accepting the Covenant and thereafter every five years. The Committee considers the reports and communicates its concerns and recommendations to the state through its "concluding observations". Pursuant to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which entered into force on 5th May 2013³⁶¹, the committee is empowered to receive and consider complaints or

³⁵⁹ *Ibid.*

³⁶⁰ ECOSOC Resolution 1985/17 of 28 May 1985. See ECOSOC, *Selected Resolutions and Decisions of the Economic and Social Council Relating to the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C. 12/1987/1 (17 December 1987) at 11.

³⁶¹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, G.A. Res., A/RES/63/117 (5 March, 2009).

communications from individuals claiming the violation of their rights under the Covenant. The Committee may consider the inter-state complaint and also undertake inquiries on grave or systematic violations of any rights under the Covenant.³⁶² The Committee may be able to accommodate the Inuit's complaints against states in view of the fact that climate change has implicated some of the economic, social, and cultural rights of the Inuit.

The CESCR has, over the years, considered, through the state reporting procedure, environmental issues as they affect rights recognized in the Covenant. In 1986, Tunisia reported to the CESCR measures taken to prevent degradation of natural resources, particularly erosion, and measures taken to prevent contamination of food in pursuance of Article 11 of the Covenant - the right to an adequate standard of living.³⁶³ Also, in 1989, the CESCR requested Poland to give information about measures taken by the government to combat environmental pollution, especially in upper Silesia.³⁶⁴ Regarding the right to life, in 1995, Ukraine reported on the environmental situation after the explosion at Chernobyl.³⁶⁵

The CESCR has also mentioned environmental issues in its General Comments. For instance, in General Comment No. 4 on the Right to Housing³⁶⁶, the CESCR recognized that environmental pollution could interfere with a person's enjoyment of his or her right to housing.³⁶⁷ Furthermore, the Committee issued General Comment on "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Article

³⁶² "Monitoring the Economic, Social and Cultural Rights", online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

³⁶³ See *Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, 1st Sess., U.N. Doc. E/1986/3/Add. 9 (1987). Dommen, *supra* note 300.

³⁶⁴ *Ibid.*

³⁶⁵ Dommen, *supra* note 300.

³⁶⁶ CESCR, *General Comment No. 4 on the Right to Adequate Housing in Compilation of General Comments and General Recommendation adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7 (2004) at 19.

³⁶⁷ *Ibid.*

12) in year 2000.³⁶⁸ The Comment states in paragraph 4 that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinates of health, such as . . . , and a healthy environment.”³⁶⁹ General Comment No. 14 further provides that “[a]ny person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels ... [and] should be entitled to adequate reparation.”³⁷⁰

The committee has also made a statement on climate change and its implication on the International Covenant on Economic, Social and Cultural Rights. In the Committee’s statement of 8 October 2018, it noted that “climate change constitutes a massive threat to the enjoyment of economic, social and cultural rights.”³⁷¹ According to the Committee,

The impacts of climate change on a range of rights guaranteed under the International Covenant on Economic, Social and Cultural Rights have been amply documented. Climate change already affects, in particular, the rights to health, food, water and sanitation; and it will do so at an increasing pace in the future. Projected increases in average seasonal temperatures and the frequency and intensity of heat waves will contribute to an increase in heat-related deaths.³⁷²

³⁶⁸UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html> [accessed 28 June 2019] [General Comment No.14].

³⁶⁹ *Ibid.* at para. 4.

³⁷⁰ *Ibid.* at 59.

³⁷¹ “Committee Releases Statement on Climate Change and the Covenant” online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>.

³⁷² *Ibid.*

(C) Committee on the Elimination of Racial Discrimination (CERD)

The CERD is another forum that possesses the capacity to entertain the Inuit's claims and complaints against states. Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by State parties.³⁷³ Like in CESCER, State parties are obligated to submit regular reports to the Committee on the implementations of the rights under the Covenant. Moreover, in addition to the state reporting procedure, there are other mechanisms for monitoring the implementation of the Covenant, namely: the early-warning procedure, inter-state complaints and the examination of individual complaints.³⁷⁴ The Inuit may explore the individual complaints procedure in seeking redress against the violation of their rights under the Covenant. The CERD has considered some cases relating to environmental issues. In 1995, the Nigerian government was asked by the CERD to report on "what was being done to preserve the identity of ethnic groups affected by the changes in and deterioration of their environment."³⁷⁵ Also in 1995, due to the reports of grave human rights violations in Bougainville prompted by indiscriminate mining operations and its adverse effect on the environment, the CERD expressed its concerns to the government of Papua New Guinea.³⁷⁶

³⁷³ "Committee on the Elimination of Racial Discrimination" online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>.

³⁷⁴ *Ibid.*

³⁷⁵ *See Elimination of Racism and Racial Discrimination, Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 50th Sess. 1603, U.N. Doc. A/50/18 (1995); Dommen, *supra* note 300 at 15.

³⁷⁶ *Ibid.*

(D.) Committee on the Rights of the Child

The Committee on the Rights of the Child (CRC) is another forum that may accommodate the complaints of the Inuit against States. The CRC is the body of eighteen Independent experts responsible for the monitoring of the Convention on the Rights of the Child, and its Optional Protocols by its State parties.³⁷⁷ The CRC has mechanisms to monitor the implementation of the Covenant and perform its functions. This includes the state reporting procedure, which requires the states to submit the Committee reports on how the rights under the covenant and its Optional Protocols are being implemented. There is also the individual complaints mechanism which entered into force in April 2014. Individuals and groups like the Inuit are allowed to submit their complaints against states that are parties to the Third Optional Protocol on a communications procedure (OPIC) for alleged violations of their rights under the convention or its optional protocols. The CRC has shown its capacity to consider environmental issues as they affect the full enjoyment of the rights guaranteed by the Covenant and its Optional protocols. For instance, in 2000, the CRC considered the report submitted by South Africa under Article 44 of the Convention.³⁷⁸ In its “Concluding Observations”, the CRC expressed concern “at the increase in environmental degradation, especially as regards air pollution. The Committee recommends that the State party increase its efforts to facilitate the implementation of sustainable development programmes to prevent environmental degradation, especially as regards air pollution.”³⁷⁹ Also, in

³⁷⁷ “Committee on the Rights of the Child”, online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

³⁷⁸ *Concluding Observations of the Committee on the Rights of the Child*, South Africa, U.N. Doc. CRC/C/15/Add.122 (2000).

³⁷⁹ *Ibid.* at para 30.

1997, the CRC expressed its concern while considering Azerbaijan's initial report on the adverse effect of the country's environmental problems on the health of the children.³⁸⁰

The complaint mechanisms under the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Rights of the Child, and the Committee on the Elimination of Racial Discrimination (CERD) may provide avenues for the Inuit to seek redress against state parties for their contributions to the change in climate which has adversely affected their rights under the Conventions and their Optional Protocols.

5.2 The Inter-American Human Rights System

The Inter-American Human Rights System is one of the human rights-related systems that can be approached to seek environmental justice and redress against Member States for their failure to take actions or address climate change which violates the human rights of the Indigenous peoples. The discussion here will, to a large extent, disclose the possibility of the Inter-American Human Rights System to accommodate the claims of the Inuit adequately.

The Inter-American Human Rights System is a regional human rights system responsible for the promotion, monitoring, and protection of human rights in the countries that are members of the Organization of American States (OAS).³⁸¹ There are currently thirty-five countries that are members of the OAS.³⁸² The Inter-American system was created in April 1948 with the adoption

³⁸⁰ See *Summary Record of the 392nd meeting*, Committee on the Rights of the Child, 15th Sess. in 17-18, U.N. Doc. CRC/C/SR.392 (1997).

³⁸¹ "Inter-American Human Rights System", online: *International Justice Resource Center* <<https://ijrcenter.org/regional/inter-american-system/>>. [IJRC].

³⁸² "Member States", online: *Organization of American States* <www.oas.org/en/member_states/default.asp>.

of the *American Declaration on the Rights and Duties of Man*³⁸³ at the conference that created the *Charter of the Organization of American States*.³⁸⁴ It is noteworthy that the American Declaration on the Rights and Duties of Man was the first international human rights instrument as it preceded the Universal Declaration of Human Rights which was adopted by the United Nations General Assembly on 10 December 1948. The *Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights* (“Protocol of San Salvador”)³⁸⁵ was adopted in 1988 and entered into force in November 1999 and added a number of economic, social and cultural rights to the American Convention.³⁸⁶

The Inter-American System is composed of two principal entities: The Inter-American Commission on Human Rights (IACHR or Commission) which was founded in 1959 by the OAS, and the Inter-American Court of Human Rights (IACtHR or Court) which was founded by the OAS in 1979. The Inter-American Commission on Human Rights is an autonomous organ of the OAS whose mandate includes the promotion and protection of human rights in the Americas. The Inter-American Court of Human Rights is an autonomous judicial organ of the OAS whose mandate is the application, interpretation, and enforcement of the American Convention on Human Rights and other treaties under the Inter-American system. The American Convention on Human Rights is currently binding on twenty-three of the thirty-five members of the OAS, and twenty members have accepted the IACtHR’s jurisdiction in accordance with Article 62 of the American Convention.³⁸⁷ While the Court acts as a forum of last resort for complaints relating to human

³⁸³ *American Declaration*, supra note 123.

³⁸⁴ *Charter of the Organization of American States*, 119 U.N.T.S. 3 (entered into force 13 December 1951) [*OAS Charter*]. See Lea Shaver, “The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?” (2010) 9:4 Wash U Global Studies L Rev at 639 <openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1059&context=law_globalstudies> [Shaver].

³⁸⁵ *Protocol of San Salvador*, supra note 74.

³⁸⁶ *Ibid.*

³⁸⁷ IJRC, supra note 381.

rights abuses that have not been addressed properly by local or domestic remedies, the Commission helps to identify and handle the cases on human rights abuse amongst others.³⁸⁸ Both the Commission and the Court are clothed with the competence to receive and consider individual complaints and petitions³⁸⁹ relating “to alleged human rights violations and may also issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm.”³⁹⁰ Essentially, a petition alleging a violation of the petitioner’s rights or those of another person may be initiated with the commission by any person, groups of persons, or non-governmental organization.³⁹¹ Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights provides that:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights...³⁹²

The Commission is equally empowered to investigate human rights situations in any of the State Parties to the Convention or instruments of the OAS.³⁹³ It also merits mention that the Commission may also receive petitions regarding the violation of the rights under the American

³⁸⁸ Shaver, *supra* note 384 at 650.

³⁸⁹ *Rules of Procedure of the Inter-American Commission on Human Rights*, Annual Report of the Inter-American Court of Human Rights, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 art. 23(Presentation of Petitions) (1992) [*IA Commission Rules*].

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*

Declaration by States which have not ratified the Convention.³⁹⁴ According to the Commission in 2010,

in addition to examining complaints of violations of the American Convention committed by the instrument's states parties, the IACHR has competence, in accordance with the OAS Charter and the Commission's Statute, to consider alleged violations of the American Declaration by OAS member states that are not yet parties to the American Convention³⁹⁵

The Court may issue an advisory opinion upon request by a Member State, by the Commission, or by other organs of the OAS.³⁹⁶ The Court has the competence to award injunctive reliefs and compensatory damages in the circumstance that the court finds the occurrence of a violation of rights under the Convention and other relevant instruments.³⁹⁷ The judgements of the Court are final and binding and are not subject to any appeals.³⁹⁸ It should be noted that the Court may consider international human rights instruments or treaties that have been ratified by a State which impose obligations on the States.³⁹⁹

There is an array of rights recognized by the Inter-American Human Rights system. These rights include, but are not limited to: the right to life; the right to humane treatment; freedom from

³⁹⁴ *Ibid.* at art. 49 (Receipt of the Petition). The IACHR has demonstrated this competence in many cases. For instance, in the case of *Mary and Carrie Dann v. United States*, the Western Shoshone indigenous people submitted a petition to the IACHR against the United States alleging violations of their rights in Nevada. The IACHR considered the petition despite the fact that the United States was yet to ratify the American Convention. See *Mary and Carrie Dann v. United States*, case 11.140, inter-Am. Comm'n H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. 1-9 (1999). Also, in *Grand Chief Michael Mitchell v. Canada*, the IACHR held Canada subject to its jurisdiction for alleged violations of the American Declaration despite the fact that Canada was not a party to the American Convention then. See *Grand Chief Michael Mitchell v. Canada*, case No. 790/01, inter-Am. Comm'n H.R., Report No. 74/03, OEA/Ser.L/V/II.118, Doc. 70 rev. 2 at 160 30 (2003).

³⁹⁵ O.A.S Secretary-General, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II, doc. 5 rev.1 (Mar. 7, 2011).

³⁹⁶ *American Convention*, *supra* note 114 at art. 64.

³⁹⁷ *Ibid.* at 63(1).

³⁹⁸ "ABC -The Inter-American Court of Human Rights 2019", online: <www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf>.

³⁹⁹ *American Convention*, *supra* note 114 at art. 29 (Restrictions Regarding Interpretation). See Shaver, *supra* note 384.

slavery; the right to personal liberty; the right to a fair trial; the right to compensation; the right to privacy; freedom of thought and expression; the right of assembly; freedom of association; rights of the family; rights of the child; the right to nationality; the right to property; freedom of movement and residence; the right to equal protection; the right to judicial protection; economic rights, social rights, and cultural rights. Several instruments within the Inter-American system guarantee these rights.⁴⁰⁰ On June 15, 2016, the General Assembly of the Organization of American States (OAS) adopted the American Declaration on the Rights of Indigenous Peoples, after seventeen years of negotiations.⁴⁰¹ This Declaration recognizes the rights of the indigenous peoples to cultural identity and integrity⁴⁰², health,⁴⁰³ the right to autonomy or self-government,⁴⁰⁴ and particularly, the right to protection of a healthy environment⁴⁰⁵ among others. Article XIX of the Declaration provides that: “Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.”⁴⁰⁶ Also, Article XIX(3) provides that: “Indigenous peoples have the right to be protected against the introduction,

⁴⁰⁰ The *American Convention*, *supra* note 114; *American Declaration*, *supra* note 123; *Protocol of San Salvador*, *supra* note 74. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, *Inter-American Convention to Prevent and Punish Torture*, *Inter-American Convention on Forced Disappearance of Persons*, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* “Convention of Belem do Para”, *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities* etc.

⁴⁰¹ *American Declaration on the Rights of Indigenous Peoples*: AG/RES.2888 (XLVI-O/16) : (Adopted at the thirds plenary session, held on June 15, 2016) [*OAS Indigenous Declaration*], See Stefania Errico, “The *American Declaration on the Rights of Indigenous Peoples*” (22 June 2017), online: *American Society of International Law* <www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples>; see “The IACHR celebrates the Adoption of the American Declaration on the Rights of Indigenous Peoples”, online: *Organization of American States* <http://www.oas.org/en/iachr/media_center/PReleases/2016/082.asp>.

⁴⁰² *OAS Indigenous Declaration*, *supra* note 401 at art. XIII.

⁴⁰³ *Ibid.* at art. XVIII.

⁴⁰⁴ *Ibid.* at art. XXI.

⁴⁰⁵ *Ibid.* at art. XIX.

⁴⁰⁶ Article XIX (1).

abandonment, dispersion, transit, indiscriminate use, or deposit of any harmful substance that could adversely affect indigenous communities, lands, territories and resources”⁴⁰⁷

The unequivocal recognition of the Indigenous peoples’ rights to a healthy environment is very significant in establishing the intersection and link between environmental protection and human rights. It also has a direct bearing on respecting the Indigenous peoples’ “right to be cold”⁴⁰⁸. The approval of the Declaration gives the Indigenous peoples’ an important source of international environmental rights instrument to guide the States in the Americas in protecting the rights of the Indigenous peoples, and also a source of international environmental rights instrument to aid the Indigenous peoples in seeking redress against states for the violation of their rights.

5.3. Climate Change and Human Rights Claims Presented Before the Inter-American Human Rights System

Over the years, several climate change and human rights claims and petitions have been presented before the Inter-American Commission on Human Rights (IACHR or Commission). These petitions have challenged the actions and inactions of states in connection with the adverse impacts of climate change on the Indigenous peoples’ rights, and environmental degradation. The discussion here will focus more particularly on the Inuit petition, and the Athabaskan petition to the Commission.

⁴⁰⁷ *Ibid.* at art. XIX (3).

⁴⁰⁸ Watt-Cloutier 2015, *supra* note 1.

5.3.1 The Inuit Petition

In 2005, the Chair of the Inuit Circumpolar Conference (ICC) (now known as Inuit Circumpolar Council), Sheila Watt-Cloutier petitioned the Commission on behalf of the Inuit people of the Arctic regions of the United States (US) and Canada. The petition sought relief for the violations of human rights as a result of the adverse impacts of climate change and global warming caused by the emissions of greenhouse gases from the US which was then the world's largest emitter of greenhouse gases.⁴⁰⁹ The Petition claimed that the United States' failure to effectively limit carbon dioxide emissions caused climate change and the negative impacts of climate change in the Arctic violated the Inuit's fundamental human rights.⁴¹⁰ The Petition outlined the negative impacts to include the melting permafrost which caused landslides and slumping, coastal erosion, storm surges and flooding, and deteriorating ice and snow conditions which affected the Inuit's ability to travel in safety, damaging their health, safety, subsistence harvest, and culture, receding glaciers, and the invasion of species of animals among others⁴¹¹ It was the petitioner's case that the US violated their right to enjoy the benefits of their culture, right to use and enjoy the lands they have traditionally used and occupied to use and enjoy their personal property, right to the preservation of health, right to life, physical integrity and security, right to their own means of subsistence, and the rights to residence and movement and inviolability of the home.⁴¹² The Inuit claimed the violations of these rights provided by the American Convention on

⁴⁰⁹ Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by the Acts and Omissions of the United States*, online: ICC <<http://www.inuitcircumpolar.com/index.php?Lang=En&ID=316>> (The Inuit Petition). See Veronica de la Rosa Jaimes, "Climate Change and Human Rights Litigation in Europe and the Americas" (2015) 5:1 Seattle J Envtl L 165 Cal W Int' LJ 218 [Veronica 2015].

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.* at 191 -192.

⁴¹² The Inuit Petition, *supra* note 409 at 74-96.

Human Rights and urged the Commission to apply this convention in the context of relevant international norms and principles.⁴¹³

The Commission dismissed the petition in November 2006 through a letter response to the ICC stating that the petition failed to establish “whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.”⁴¹⁴ In other words, the petitioner provided insufficient information to enable the Commission to determine a violation of the rights protected by the American Declaration.⁴¹⁵ The petitioner responded to this letter by requesting a “hearing on the potential connection between the effects of global warming and human rights.”⁴¹⁶ The Commission held the “hearing to address matters raised by the petition without revisiting the petition itself.”⁴¹⁷ Although the petition was dismissed, it demonstrated the legal creativity needed to expose the adverse effects of climate change in the Arctic and its attendant violations of the fundamental human rights of the Inuit and the inhabitants of the Arctic.

Interestingly, with the recent adoption of the *American Declaration on the Rights of Indigenous Peoples*⁴¹⁸ by the General Assembly of the Organization of American States (OAS) which expressly recognizes a right to a healthy environment, it may not be difficult for the Indigenous peoples to bring their claims of the violation of their right to a healthy environment under this Declaration.

⁴¹³ *Ibid.*

⁴¹⁴ Letter from Ariel E. Dulitzky, Assistant Exec. Secretary, IACHR, to Sheila Watt-Cloutier (16 November 2006), available at <graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

⁴¹⁵ Juan Auz, “Why is the Inter-American Human Rights System Lagging on Climate Change?” (11 January 2018), <www.openglobalrights.org/why-is-the-inter-american-human-rights-system-lagging-on-climate-change/>.

⁴¹⁶ Veronica 2015, *supra* note 409 at 192; see Letter from Sheila Watt-Cloutier, et al., to Santiago Canton (15 January, 2007), available at <www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf>.

⁴¹⁷ Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights, to Sheila Watt-Cloutier, Petitioner (1 February 2007), available at <www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf>.

⁴¹⁸ OAS *Indigenous Declaration*, *supra* note 402.

5.3.2 The Athabaskan Petition

In April 2013, the Arctic Athabaskan Council (AAC), the Earthjustice and Ecojustice Canada, “on behalf of all the Arctic Athabaskan Peoples of the Arctic regions of Canada and United States, filed a petition with the Inter American Commission on Human Rights (IACHR)”⁴¹⁹ seeking relief from violations of their rights resulting from rapid Arctic warming and melting caused by emissions of black carbon for which Canada has international responsibility.⁴²⁰ The AAC or petitioner contended that the “lack of effective federal and provincial regulations for black carbon emissions is accelerating Arctic warming, violating the human rights of Arctic Athabaskan peoples.”⁴²¹ The AAC supported its petition with an array of international human rights instruments and case laws to establish their claims, and also a plethora of documentary evidence demonstrating the observations of the Athabaskan peoples claiming the adverse effects of climate change on them which violate their human rights. They have asked the IACHR to investigate and declare that Canada’s failure to implement adequate measures to reduce black carbon emissions violates their rights established in Article XIII (right to the benefits of their culture)⁴²², Article XXIII (right to property)⁴²³, and Article XI (right to health)⁴²⁴ of the American Declaration.⁴²⁵ They also urge the IACHR to “recommend that Canada takes steps to limit black carbon emissions and to protect the Athabaskan culture and resources from the effects of the accelerated Arctic warming.”⁴²⁶

⁴¹⁹ Veronica, *supra* note 14 at 236.

⁴²⁰ *Ibid.*; Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting caused by Emissions of Black Carbon by Canada* (23 April 2013), <earthjustice.org/sites/default/files/SummaaryAACpetition13-04-23.pdf> [Athabaskan Petition].

⁴²¹ Veronica 2015, *supra* note 409 at 193; see Athabaskan Petition *supra* note 416 at 16.

⁴²² Athabaskan Petition *supra* note 420 at 61.

⁴²³ *Ibid.* at 71.

⁴²⁴ *Ibid.* at 76.

⁴²⁵ Veronica 2015, *supra* note 409 at 193.

⁴²⁶ *Ibid.*

Like the Inuit, the Athabaskan Peoples depend on the integrity of their environment, culture, and ecosystem for their livelihood. To ensure a successful outcome in this case, the Athabaskan Peoples are required to prove that the environmental degradation alleged violates their human rights as recognized by the American Declaration and other regimes. In addition to this, they must demonstrate the causation between the alleged human rights violation and the acts or omissions of Canada.⁴²⁷ Furthermore, they would be required to show that they have exhausted domestic remedies as provided for in the Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights.⁴²⁸ It should be noted that Article 31 provides three exceptions to this rule. One, “if access to the remedies under domestic law has been denied; if there has been an unwarranted delay in rendering a final judgment or, when “the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated”.”⁴²⁹ In response to this, the AAC contends that the requirement for exhaustion of domestic remedies is not relevant in this case because “Canadian law offers Arctic Athabaskan Peoples ‘no reasonable chance of success’ due to the undue burden such challenges would impose, the lack of remedies under Canadian constitutional, statutory and common law.”⁴³⁰ This contention finds justification in the jurisprudence of the IACHR. In the case of *Hul’Qumi’Num Treaty Group v Canada*⁴³¹, the IACHR states that: “a petitioner may be exempt from the requirement of having to exhaust domestic remedies with regard to a complaint, when it is evident from the case file that

⁴²⁷ Veronica, *supra* note 14 at 258.

⁴²⁸ *IA Commission Rules*, *supra* note 389 at art. 31.

⁴²⁹ *Ibid.*; Veronica, *supra* note 14 at 256.

⁴³⁰ Athabaskan Petition *supra* note 420 at 83.

⁴³¹ *Hul’Qumi’Num Treaty Group v Canada*, Case 592-07, Inter-Am. Comm’n H.R., Report No. 105/09, OEA/Ser.L/V/II. Doc. 51 corr. 1 41 (2009); see Veronica, *supra* note 14 at 257.

any action filed regarding that complaint had no reasonable chance of success based on the prevailing jurisprudence of the highest courts of the State.”⁴³²

The Commission’s decision is currently pending in this case. Having failed the Inuit, the IACHR has been given another opportunity to turn the tide in favour of the indigenous peoples to help them seek redress against states that have not taken adequate actions to reduce their contribution to climate change which violates their human rights, and also negatively impacts their culture and way of life. It is strongly believed that the Inter-American Human Rights system offers an effective forum for the Inuit and the indigenous peoples in their search for remedies.

5.4. Principles of International Law

The principles of international law also play a significant role in aiding the Indigenous peoples to seek redress against States for their refusal to take actions to reduce their contributions to Climate Change. The principles of international law, such as the duties of states under the principle of state responsibility, and the principle of precautionary approach and preventive action would be considered.

⁴³² *Ibid.*

5.4.1 The Principle of State Responsibility

Article 1 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*⁴³³ creates the responsibility of a state for its internationally wrongful acts. It provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁴³⁴ Article 2 provides that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”⁴³⁵ The Arbitral Tribunal in the case of “*Rainbow Warrior*”⁴³⁶ stated that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility”.⁴³⁷ The principle of State Responsibility establishes that States are generally held accountable for their violations of international law. “Breaches of international law, a customary law or treaty obligation legitimizes a claim from the injured state towards the violating state. These claims may take the form of diplomatic action or recourse to international mechanisms or to courts or tribunals...”⁴³⁸ States have a responsibility to protect the environment. The International Court of Justice in its advisory opinion to the United Nations General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* opined that:⁴³⁹ “[t]he existence of the general obligation of states to ensure that activities within their jurisdiction and

⁴³³ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, UN GAOR 56th Sess., Supp. No. 10 UN Doc. A/56/10 (2001) at art. 1 [ILC Draft Articles].

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid* at art.2.

⁴³⁶ “Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).”

⁴³⁷ *Ibid* at 251.

⁴³⁸ Gregor Noll, *State Responsibility in relation to Transboundary Environmental Damage* (LLM Thesis, University of Lund, Faculty of Law, 2007) [unpublished].

⁴³⁹ *Legality of the Threat of Nuclear Weapons*, Advisory Opinion [1996] I.C.J. Rep. 226 [*Nuclear Weapons*].

control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment”.⁴⁴⁰

Furthermore, Principle 21 of the *Declaration of the United Nations Conference on the Human Environment* (1972 Stockholm Declaration) confirms the principle of State responsibility in relation to the environment. It states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴⁴¹

The doctrine of State responsibility requires the States to protect their environments and also ensures that activities within their jurisdictions do not violate the environment of other States. Therefore, a refusal of any State to take actions to reduce its contributions to climate change would violate the principle of state responsibility, and this may trigger actions or claims from other States against the state for the protection of their environment.

5.4.2 The Principle of Precautionary Approach and Preventive Action

This principle generally requires States to take actions to prevent environmental damage or degradation. Principle 14 of the *Rio Declaration on Environment and Development*⁴⁴² emphasizes the principle of precautionary approach and preventive action in relation to the

⁴⁴⁰ *Ibid* at 242.

⁴⁴¹ Stockholm Declaration, *supra* note 62 at Principle 21.

⁴⁴² Rio Declaration, *supra* note 64 at Principle 14.

environment. It provides that: “States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation...”⁴⁴³ Furthermore, paragraph 3 of Article 14 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*⁴⁴⁴ emphasizes the duty of States to take preventive measures. Moreover, in *Trail Smelter*⁴⁴⁵, the principle was properly articulated. The arbitration tribunal noted the obligation of States to prevent transboundary damage.

In view of the above, it is clear that States have an obligation to take action to prevent transboundary damage. Therefore, the refusal of any State to take actions to reduce its contributions to climate change would violate and prevent transboundary damage will be viewed as a breach of its obligation under the precautionary approach and preventive action, this may trigger actions from other States against the defaulting State.

Moreover, Article 4 (2) (a) of the UNFCCC, 1992⁴⁴⁶, imposes a binding obligation on the developed country Parties. It provides that “[e]ach of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases ...”⁴⁴⁷ Therefore, a violation of this obligation by any stated will trigger a cause of action against the United States.

⁴⁴³ *Ibid.*

⁴⁴⁴ ILC Draft Articles, *supra* note 433 at art.14.

⁴⁴⁵ *Trail Smelter Arbitration (United States v. Canada)*, 16 April 1938, 11 March 1941; 3 R.I.A.A. 1907 (1941) [*Trail Smelter*].

⁴⁴⁶ UNFCCC, *supra* note 2 at art. 4(2)(a).

⁴⁴⁷ *Ibid.*

5.5 The Inuit's Case

This section demonstrates the Inuit's case against the United States of America. It builds the hypothetical claims against the United States largely for two reasons: 1.) the United States being the biggest emitter of GHGs, and 2.) the intention of the US to withdraw from the Paris Agreement, which is the most recent and ambitious global effort aiming to reduce global temperature and the distressing impacts of climate change.⁴⁴⁸ The Inuit's case establishes the evidence of environmental degradation in the Arctic, the state actions or omissions that have contributed to the environmental degradation in the Arctic, the violated rights of the Inuit, the remedies under the United Nations human rights system, and the remedies under the Inter-American human rights system. It concludes that there are effective remedies under UN human rights system and also under the Inter-American human rights system.

Generally, using the human rights approach to address environmental degradation claims involves establishing a link between environmental damages and human rights abuses. Chapter two of this thesis revealed the nexus between the human and environmental rights of the Indigenous peoples. Thus, the environmental degradation in the Arctic and its human rights implications on the Inuit and their ecosystem builds a proper case upon which the Inuit may seek redress. Some scholars have opined that three conditions are germane in establishing a valid environmental human rights claim. These conditions are: “(1) environmental degradation; (2) a nation-state action or omission that results in or contributes to that environmental degradation; and (3) a deprivation of human rights that results from the environmental degradation.”⁴⁴⁹ Essentially,

⁴⁴⁸ I have taken the liberty to not consider bringing claims against Canada (which is close to the Arctic) and China (which is up wind) because they have both ratified the Paris Agreement and are not considering withdrawing from it. China offered the required leadership and support in ensuring the adoption of the Paris Agreement.

⁴⁴⁹ Linda A. Malone & Scott Pasternack, “Exercising Environmental Human Rights and Remedies in the United Nations System” (2002-2003) 27 Wm. & Mary Env'tl. L. & Pol'y. Rev. 365 at 367 [Malone & Pasternack].

an individual, group, or state seeking redress in an environmental human right claim must prove that there is actual environmental damage or degradation which may include, but is not limited to, damage to the ecosystem, infrastructure, natural habitats, emissions of, greenhouse gases and other hazardous pollutants into the air, among others.⁴⁵⁰ There should also be a State action or omission that has contributed to and occasioned the environmental degradation. The action or omission may include the failure of a State to recognize its obligations under the climate treaties, or the failure of a state to reduce its emissions of greenhouse gases, among others. In addition to this, there should be proof to demonstrate that the human rights of the claimants have been violated. These three conditions will be addressed to demonstrate the valid environmental human rights' case of the Inuit, its strengths and weaknesses.

5.5.1 Evidence of Environmental Degradation in the Arctic

The observed impacts of climate change in the Arctic, which have occasioned grave environmental degradation, have been comprehensively discussed in Chapter three of this thesis. In addition to this, the Inuit, in their petition to the Inter-American Commission on Human Rights, relied on some key indicators of climate change in the Arctic to substantiate their claims. One of the most significant pieces of scientific evidence regarding the impact of climate change in the Arctic is the 2004 Arctic Climate Impact Assessment (ACIA)⁴⁵¹. The ACIA addressed the key indicators to confirm the vulnerability of the Arctic to climate change, and concludes that the “Arctic is now experiencing some of the most rapid and severe climate change on earth.”⁴⁵² More

⁴⁵⁰ *Ibid.*

⁴⁵¹ ACIA Overview, *supra* note 24.

⁴⁵² *Ibid.*

recent evidence of the impact of climate change in the Arctic is the assessment of the Arctic Monitoring and Assessment Programme (AMAP) on Snow, Water, Ice and Permafrost in the Arctic (SWIPA)⁴⁵³, which was conducted between 2008 and 2011. The SWIPA assessment was a follow-up to the ACIA, which confirmed and corroborated the findings of the ACIA regarding the observed impacts of climate change in the Arctic. The ACIA, the SWIPA and several other reports list the following as the impacts of climate change in the Arctic which have caused environmental degradation and also affected the peoples of the Arctic:

i. Increase in Arctic Temperatures

In addition to the ACIA and SWIPA, the 2018 IPCC Special Report on the impact of global warming has provided further proof of the rise in warming and temperatures of the Arctic. It notes that “warming greater than the global annual average is being experienced in many land regions and seasons, including two to three times higher in the Arctic.”⁴⁵⁴ The implications of the rising temperatures are dire as this will negatively impact the natural and climate systems of the peoples of the Arctic

ii. Melting of sea ice

For the Inuit, the consequences of the melting or reduced sea ice are multi-dimensional, having economic, environmental, and social implications. It also negatively impacts their hunting culture, food security, and way of life. Melting sea-ice has forced the Arctic animals, which the people hunt, to “decline, become less accessible, and possibly become extinct.”⁴⁵⁵ Reduction in

⁴⁵³ SWIPA, *supra* note 159.

⁴⁵⁴ IPCC 2018, *supra* note 162.

⁴⁵⁵ ACIA Overview, *supra* note 24 at 16.

sea-ice has affected and will continue to affect the habitat of polar bears, seals, sea birds, walrus, and several other marine animals

iii. Thawing Permafrost

The consequences of the thawing permafrost can be felt in the destruction of buildings, infrastructure and other amenities that are crucial to the survival and overall wellbeing of the people of the Arctic. The thawing permafrost also causes flooding, erosion, and destruction of sewage pipes, which then occasions the outbreak of waterborne diseases.⁴⁵⁶ Furthermore, the thawing permafrost releases trapped microbes and poisonous mercury into the atmosphere. These, undoubtedly, have implications on human health.

iv. Melting Glaciers

The melting of glaciers now contributes significantly to the rising sea level, not only in the Arctic but globally as well.⁴⁵⁷

v. Sea Level Rise

Implications of the rising sea level for the people of the Arctic and the world include erosion and flooding amongst others.⁴⁵⁸ Rising sea level causes coastal erosion and also increases the risk of flooding, which could submerge houses, properties and homes.⁴⁵⁹

⁴⁵⁶ IPCC 2018, *supra* note 162 at 73, 77.

⁴⁵⁷ ACIA Overview, *supra* note 24 at 8.

⁴⁵⁸ IPCC 2018, *supra* note 162 at 11 & 86.

⁴⁵⁹ *Ibid.* at 86.

vi. Increasing Precipitation

The increase in precipitation poses the risk of flooding⁴⁶⁰ and the likelihood of an increase in the volume of organic pollutants and mercury in the region. It also increases river flow and causes changes to the freshwater flux.⁴⁶¹

vii. Increase Ultraviolet (UV) Radiation Levels

For the people of the Arctic, the consequences of the increases in UV levels are distressing. The rise in UV levels could cause skin cancer, viral infections, skin diseases, cataracts, immune system suppression, and several other skin illnesses.⁴⁶²

viii. Other Impacts of Climate Change

Further impacts of climate change on the Arctic and its inhabitants include those on transportation as well as the access to Arctic resources, natural systems, and freshwater ecosystems. Access to resources, such as fish, are being frustrated due to climate change⁴⁶³ and, in addition, climate change has continued to disrupt the habitat of marine species, ice-dependent seals, sea birds, seals, the Walrus, polar bears, and several other animals. The climate no longer supports the culture and the means of livelihood of the Inuit as it has previously.⁴⁶⁴ The Inuit hunters have confirmed that the sea ice is thinning and the decrease in the numbers of ringed seals.⁴⁶⁵

⁴⁶⁰ ACIA Overview, *supra* note 25 at 117.

⁴⁶¹ IPCC 2018, *supra* note 163.

⁴⁶² ACIA Overview, *supra* note 25 at 102.

⁴⁶³ ACIA Overview, *supra* note 25 at 67.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.* at 92.

Having established the evidence of environmental degradation in the Arctic and its impact on the Inuit, the next condition to be addressed is the state action or omission that has contributed and caused environmental degradation.

5.5.2 The State Actions or Omission that has contributed to the Environmental Degradation in the Arctic

Environmental degradation in the Arctic is deemed to have been exacerbated by human activities, which are responsible for the rise in global temperatures and climate change. These human activities are either directly or indirectly encouraged by acts or omissions of states. The Inuit, in their petition to the Inter-American Commission on Human Rights, held the United States of America responsible for their actions which have violated the Inuit's human rights and also degraded environmental conditions of the Arctic. It was a convenient decision for the Inuit to hold the US liable because the US was the world's largest emitter of greenhouse gases.⁴⁶⁶ According to the Inuit's petition, "[t]he dominant role of the United States in carbon emissions correlates well with the country's estimated contribution to the global temperature increase. U.S. greenhouse gas emissions between 1850 and 2000 are responsible for 0.18°C (30%) of the observed temperature increase of 0.6°C during that period..."⁴⁶⁷ Furthermore, "[t]he United States continues to be the world's largest emitter of energy-related CO₂, accounting for nearly one-quarter of the world's

⁴⁶⁶ According to Martin Wagner, the Earthjustice attorney who handled the Inuit's case – "[t]he United States makes up only five percent of the world's population, but emits one-quarter of global greenhouse pollution." See: "Inuit Human Rights Petition Filed Over Climate Change", online: *Earthjustice* <earthjustice.org/news/press/2005/inuit-human-rights-petition-filed-over-climate-change>.

⁴⁶⁷ The Inuit Petition, *supra* note 409 at 68, 69; another study shows that, because CO₂ persists in the atmosphere for long periods of time, about 31% of today's global-mean surface temperature increase can be attributed to U.S. CO₂ emissions from fossil fuels. See Elzen and Schaeffer, "Responsibility for Past and Future Global Warming: Uncertainties in Attributing Anthropogenic Climate Change," (2002) 54 *Climatic Change* 29, 68 (data as of 1990).

current emissions. It far exceeds the next two largest emitters, China and the European Union, which each account for approximately 14% of global greenhouse gas emissions.”⁴⁶⁸

The situation is almost the same today as the United States is now notorious for being the world’s second largest emitter of greenhouse gases as it contributes 14.36% to global emissions.⁴⁶⁹ Moreover, while countries of the world continue to agree on reducing greenhouse gas emissions and also take actions on climate change mitigation measures, the “intended” withdrawal of the United States of America⁴⁷⁰ from the Paris Agreement makes further deposition to the state action that has encouraged or contributed to environmental degradation in the Arctic.

It is now common-knowledge from the “evidence of environmental degradation in the Arctic” addressed in **5.5.1.** that climate change has had devastating impacts on the Arctic and has also violated the fundamental human rights of the Inuit.

5.5.1 The Violated Rights of the Inuit

The third condition to be addressed is the rights of the Inuit that have been violated by the environmental degradation in the Arctic and the act of the state. Chapter two has addressed the fundamental human environmental rights of the Indigenous peoples. Due to the Inuit’s close ties to their environment, environmental damage experienced in the Arctic will have a direct and

⁴⁶⁸ *Ibid.* at 40, n. 16.

⁴⁶⁹ Johannes Friedrich, Mengpin Ge & Andrew Pickens, “This Interactive Chart Explains World’s Top 10 Emitters, and How They’ve Changed” online: World Resources Institute <www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed> [Friedrich].

⁴⁷⁰ On the 4th of August, 2017 when the United States submitted a formal notification of its intention to withdraw its participation in the Paris Agreement to the United Nations. See Intent to Withdraw, *supra* note 276. Prior to this official notification, President Trump had taken huge steps to roll-back the efforts of the Obama administration in addressing climate change. The steps include his Executive Order of 28th March, 2017. See: Executive Order, *supra* note 278.

consequential effect on the full enjoyment of their fundamental rights. The following are the rights directly implicated by climate change and the rise in temperature:

1. The Right to Life

Article 3 of the *Universal Declaration of Human Rights* (UDHR)⁴⁷¹ provides for the right to life. Additionally, Article 6 of the *International Covenant on Civil and Political Rights* expressly recognizes the right to life.⁴⁷² This right has also been recognized in several international and regional instruments.⁴⁷³ Article 1 of the American Declaration also recognizes the right to life. It states that “[e]very human being has the right to life, liberty and the security of his person.”⁴⁷⁴ The United States, by virtue of its ratification of the OAS Charter and the International Covenant on Civil and Political Rights⁴⁷⁵, and adopting the American Declaration, and also signing the American Convention on Human Rights⁴⁷⁶ is bound to respect and protect the right to life expressly provided for by these instruments. What’s more, Article XIX of the American Declaration on the Rights of Indigenous Peoples has established the link between the right to life and the right to a healthy environment. Article XIX provides that: “Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.”⁴⁷⁷

⁴⁷¹ UDHR, *supra* note 46 at art. 3.

⁴⁷² ICCPR, *supra* note 50 at art. 6.

⁴⁷³ CRC, *supra* note 114 at art. 24, CRPD, *supra* note 124 at art. 10, Banjul Charter, *supra* note 67 at art. 4 etc.

⁴⁷⁴ American Declaration, *supra* note 123 at art. I.

⁴⁷⁵ Office of the U.N. High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004) at 11, at <www.unhchr.ch/pdf/report.pdf>; See Status of Ratifications, United Nations Treaty Collection, online: Status of Ratification <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>>.

⁴⁷⁶ Inter-Am. C.H.R., Signatures and Current Status of Ratifications: American Convention on Human Rights, at <www.cidh.org/Basicos/basic4.htm#9>.

⁴⁷⁷ OAS Indigenous Declaration, *supra* note 402 at art. XIX.

The right to life guaranteed by the instruments mentioned above has been violated by the acts and omissions of the United States. The increase in Arctic temperatures has negatively impacted the natural and climate systems of the Arctic, thereby threatening full enjoyment of the right to life and violating the right to life of the Inuit. As mentioned above, an unhealthy environment is a threat to the right to life and, as such, a violation of the right to life. The melting of the sea ice has impacted the hunting culture, food security, and way of life of the Inuit. It has forced the animals, which the Inuit rely on as their source of food, to decline or become inaccessible, thereby violating their right to life. Furthermore, the thawing permafrost has occasioned the destruction of buildings and infrastructure, which are crucial to the survival of the Inuit. Also, the sea level rise experienced in the Arctic has caused coastal erosion and flooding which could submerge houses, properties and homes.⁴⁷⁸ Moreover, the increased ultraviolet (UV) radiation levels in the Arctic has the capacity to cause skin cancer, viral infections, skin diseases, cataracts, immune system suppression, and several other skin illnesses. All the above evidence how the adverse effect of climate change in the Arctic directly violates the right to life. The myriads of evidence of polluted water, contaminated food, and unclean air in the Arctic have grave implications on the right to life of the Inuit.

2. The Right to Health

The right to health of the Inuit has also been violated. This right has been recognized by Article 25 UDHR⁴⁷⁹, Article 12(1) of the ICESCR⁴⁸⁰, Article 24 of the Convention on the Rights

⁴⁷⁸ IPCC 2018, *supra* note 162 at 86.

⁴⁷⁹ UDHR, *supra* note 46 at art. 24.

⁴⁸⁰ ICESCR, *supra* note 51 at art. 12(1).

of the Child⁴⁸¹, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination⁴⁸², Articles 12 & 14 of the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁸³, Article XI (11) of the American Declaration on Rights and Duties of Man⁴⁸⁴, and Article 25 of the Convention on the Rights of Persons with Disabilities.⁴⁸⁵ Moreover, Article XVIII of the American Declaration on the Rights of Indigenous Peoples recognizes the Indigenous peoples' right to health. Article XVIII provides that "Indigenous peoples have the collective and individual right to the enjoyment of the highest attainable standard of physical, mental, and spiritual health."⁴⁸⁶ The link between the right to health and the environment is inextricable. Environmental pollution and climate change undermine the Inuit's right to health.

Interestingly, the Inter-American Commission on Human Rights recognized the close link between environmental degradation and the right to health, particularly as it concerns Indigenous peoples in the Yanomami case.⁴⁸⁷ The Commission held in this case that environmental degradation violated the right to health guaranteed in Article XI of the American Declaration.⁴⁸⁸

The observed impacts of climate change in the Arctic are typical instances of the violation of the Inuit's right to health. For example, the thawing permafrost releases trapped microbes and poisonous mercury into the atmosphere. The implications of this on the health of the Inuit cannot

⁴⁸¹ *CRC*, *supra* note 114 at art. 24.

⁴⁸² *ICERD*, *supra* note 121 at art. 5.

⁴⁸³ *CEDAW*, *supra* note 122 at art. 12 & 14.

⁴⁸⁴ *American Declaration*, *supra* note 123 at art. XI(11).

⁴⁸⁵ "What is the Human Right to Health and Health Care?", online: *NESRI* <www.nesri.org/programs/what-is-the-human-right-to-health-and-health-care>; see Jayashee Palande & Nazafarin Nazemi, "Impact of Globalization on the Right to Health as an Instance of Human Rights", *Acta Universitatis Danubius. Communicatio*, (2011) 5, 1 at 120.

⁴⁸⁶ *OAS Indigenous Declaration*, *supra* note 402 at art. XVIII.

⁴⁸⁷ See *Yanomani v. Brazil* (1985), Inter. Am. Comm. H.R. No. 7615, OAE/Ser.L/VII.66.doc.10 rev.1, 24 [Yanomani];

⁴⁸⁸ *Ibid.*

be overemphasized. The thawing permafrost also causes flooding, erosion, destruction of sewage pipes, which then occasions the outbreak of waterborne diseases.⁴⁸⁹ In addition to this, the increase in precipitation has contributed to the increase in the volume of organic pollutants and mercury that are in the region. Furthermore, the increased ultraviolet (UV) radiation levels in the Arctic could cause skin cancer, viral infections, skin diseases, cataracts, immune system suppression, and several other skin illnesses. Moreover, the reduction in the sea ice in the Arctic has affected the survival and health of the animals that are dependent on the Arctic sea ice such as seals, walrus, polar bears and sea birds.⁴⁹⁰ Also, the increase in Arctic temperatures has caused an increase in heat-related health problems.⁴⁹¹ All the above mentioned and many other implications of climate change in the Arctic have triggered a violation of the Inuit's right to health.

3. Right to Property, Privacy and/or Inviolability of the Home and Family

The Inuit's right to property, privacy and/or inviolability of the home and family have been violated. The right to property is protected under several international human rights systems. Article 17 of the UDHR recognizes the right to property.⁴⁹² Also, Article 21 of the American Convention provides for the right to property. It states that "[e]veryone has the right to the use and enjoyment of his property...."⁴⁹³ Similarly, Section Five of the American Declaration on the Rights of Indigenous Peoples provides for the social, economic, and property rights of the

⁴⁸⁹ ACIA Overview, *supra* note 24 at 73, 77.

⁴⁹⁰ The Inuit Petition, *supra* note 409 at 45.

⁴⁹¹ *Ibid.* at 59.

⁴⁹² UDHR, *supra* note 46 at art. 17.

⁴⁹³ Protocol of San Salvador, *supra* note 74 at art. 21.

Indigenous peoples. The several instances of environmental degradation prompted by the actions and omissions of states (particularly the US) have violated the Inuit's right to property.

“Climate change has made the Inuit's traditional lands less accessible, more dangerous, unfamiliar, and less valuable to the Inuit. The disappearance of sea ice, pack ice, and multi-year ice is affecting the very existence of Inuit land.”⁴⁹⁴ Climate change has damaged the properties of the Inuit due to erosion and flooding caused by the loss of sea ice and thawing of the permafrost.⁴⁹⁵ Furthermore, according to the Inuit petition, “the melting permafrost has altered the characteristics of Inuit land, diminishing its value to the Inuit, and affecting their ability to use and enjoy their property.”⁴⁹⁶ This violates their right to the full enjoyment of their property. The United States' contributions to climate change through their emissions of greenhouse gases violate the Inuit's fundamental human right to use and enjoy their property.

4. Right to Culture

The Inuit's right to enjoy the benefits of their culture have been violated by global warming and climate change. Several international human rights instruments recognize the right of Indigenous peoples to enjoy their culture. Article 27(1) of the UDHR provides for the right of everyone to freely take part in their cultural life. Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also affirms this right. Furthermore, Article 30 of the Convention on the Rights of the Child recognizes the right of children and Indigenous persons to enjoy their culture. Article XIII of the American Declaration guarantees the Inuit's right

⁴⁹⁴ The Inuit Petition, *supra* note 409 at 82.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

to the benefits of culture.⁴⁹⁷ Additionally, Article 16 of the American Convention recognizes the right of individuals to associate freely for cultural purposes, among others.⁴⁹⁸ Article 27 of the *International Covenant on Civil and Political Rights* (“ICCPR”) provides that members of minority groups “shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”⁴⁹⁹ Moreover, the *Charter of the Organization of American States* mandates Member States to preserve and enrich the cultural heritage of the American peoples. It provides that: Member States are “individually and jointly bound to preserve and enrich the cultural heritage of the American peoples”.⁵⁰⁰ Several articles of the American Declaration on the Rights of Indigenous Peoples guarantee the protection of the cultural rights of the Inuit.⁵⁰¹

It is long settled that environmental degradation violates the right to enjoy the benefits of culture. The Inter-American Court in *Caso de la Comunidad Mayagna (Sumo) Awas Tingni* (“Awas Tingni Case”)⁵⁰² recognized the close link between the culture and the land of the Indigenous peoples. It held that “[t]he close ties of Indigenous people with the land must be

⁴⁹⁷ Article XIII of the American Declaration provides that: “Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.” See: *American Declaration*, *supra* note 124 at art. XIII.

⁴⁹⁸ Protocol of San Salvador, *supra* note 74 at art. 16. (“Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes”).

⁴⁹⁹ *ICCPR*, *supra* note 50 at art.27.

⁵⁰⁰ *OAS Charter*, *supra* note 384 at arts. 2(f), 3(m), 30, 48.

⁵⁰¹ Article VI of the American Declaration on the Rights of Indigenous Peoples recognizes the collective rights of the indigenous peoples. It provides that: “Indigenous peoples have collective rights that are indispensable for their existence, well-being, and integral development as peoples. In that regard, States recognize and respect the right of indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources. States shall promote, with the full and effective participation of indigenous peoples, the harmonious coexistence of the rights and systems of different population groups and cultures.” See *OAS Indigenous Declaration*, *supra* note 402 at art. VI. Furthermore, Article X of the American Declaration on the Rights of Indigenous Peoples also recognizes the protection of the cultural rights of the indigenous peoples against destruction. Article XVII also guarantees the right of the indigenous child to enjoy his or her own culture. See *OAS Indigenous Declaration*, *supra* note 402 at art. X.

⁵⁰² *Case of the Mayagna (Sumo) Awas Tingni Indigenous Community v. The Republic of Nicaragua*, Judgment of 31 August, 2001, Inter-Am. Ct. H.R. Series C, No. 79 [Awas Tingni]

recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”⁵⁰³ In addition to this, the Commission in the case of *Maya Indigenous Communities of the Toledo District* (“Belize Maya”), acknowledged that any interference with the lands of the Indigenous peoples has a significant implication on their right to culture.⁵⁰⁴ The Inuit’s culture is inseparable from the condition of their lands as such any environmental degradation caused by a State’s action or inaction violates the human right to the benefits of culture.

The United States, through its failure to reduce its greenhouse gas emissions, has degraded the Arctic region, thereby violating the Inuit’s right to enjoy the benefits of their culture. The “changes in arctic ice, snow, weather patterns and land caused by climate change is resulting in the destruction of Inuit culture.”⁵⁰⁵ The Inuit are no longer able to enjoy their hunting culture due to the significant impacts of climate change on the arctic animals. Some of the animal species or game have either declined or are no longer available. Furthermore, land slumping, landslides and erosion in the Arctic threatens the Inuit’s cultural and historic sites.⁵⁰⁶ Erosion has also destroyed some of the traditional routes making it very difficult to travel⁵⁰⁷ The change in climate has also affected their traditional methods of food storage due to the thawing of permafrost.⁵⁰⁸

⁵⁰³ *Ibid.*

⁵⁰⁴ *Maya Indigenous Communities of the Toledo District (Belize Maya)*, Case 12.053, Inter-Am. C. H.R. Report 40/04 (2004) (Belize) [*Belize Maya*].

⁵⁰⁵ The Inuit Petition, *supra* note 409 at 76.

⁵⁰⁶ *Ibid.* at 78.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

5. The Right to a Healthy Environment

The change in climate has equally violated the Indigenous peoples' right to a healthy environment. The American Declaration on the Rights of Indigenous Peoples particularly acknowledges the Inuit's right to live in a healthy, safe, and sustainable environment.⁵⁰⁹ This has unequivocally established the link between environmental protection and human rights. The action of the United States has violated the Inuit's right to a healthy environment. Due to the consequences of the several indicators of climate change in the Arctic such as the melting of sea ice, thawing of permafrost, increase in the arctic temperatures, sea level rise, increasing precipitation, increased ultraviolet (UV) radiation levels, and the disruption of the habitat of marine species and other arctic animals among others, the Arctic is no longer safe or healthy for the Inuit.

Other rights that have been violated by the United States due its failure to take effective action to reduce its greenhouse gas emissions include the right to food, right to an adequate standard of living, the Inuit's right to their own means of subsistence, right to residence and movement, and the Inuit's right to use and enjoy their personal, intangible and intellectual property among others. All these human rights are expressly guaranteed and provided for by relevant international (including regional) human rights instruments.

⁵⁰⁹ Article XIX of the American Declaration on the Rights of Indigenous Peoples provides that: ("Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being."). See OAS *Indigenous Declaration*, *supra* note 402 at art. XIX.

5.5.4 The Remedies Available Within the United Nations Human Rights System and the Inter-American Human Rights System

Having established that the United Nations human rights instruments and the Inter-American human rights instruments provide for the Inuit's fundamental human rights and that the United States has violated these rights, the next issue to be addressed is the remedies available within these international human rights systems. The availability of remedies within these systems is a confirmation of the ancient latin maxim '*Ubi jus ibi remedium*' which means "where is there is a right, there is a remedy". Generally, the law provides means of enforcing rights, and a person whose rights have been violated would usually have the right to remedies in an action before a court, committee, or any relevant institutions. This principle guides the courts and other dispute resolution bodies.

5.5.4.1 Remedies Under the United Nations Human Rights System

Under the United Nations human rights system, there are several bodies which may accommodate the case of the Inuit. These bodies include the Human Rights Council (HRC) using its Complaint Procedure, the Human Rights Committee established pursuant to Article 28 of the Covenant on Civil and Political Rights⁵¹⁰, UN Committee on the Elimination of Racial Discrimination (CERD), U.N. Committee on Economic, Social and Cultural Rights, and the UN Committee on the Rights of the Child (CRC) amongst others. The mandates, powers, requirements and procedure for submitting petitions and complaints before these committees have been discussed earlier in this Chapter. These bodies allow individuals, groups like the Inuit, or non-governmental organizations that claim to be victims of human rights violations to submit a

⁵¹⁰ ICCPR, *supra* note 50 at art. 28.

complaint against any member states of the United Nations and countries regardless of whether the countries have ratified any UN treaties or instruments. For instance, the Complaint Procedure of the HRC allows individuals, groups, and organizations to bring human rights violations to the HRC. However, the Inuit must show that the object of the complaint is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), and other instruments relating to human rights. Also, the complaint must disclose the alleged violations and the rights which have been allegedly violated. The Inuit must also show that the complaint has not already been dealt with by a special procedure, treaty body or other United Nations or similar regional complaints procedure in the field of human rights; and that the complainants have explored and exhausted domestic remedies unless it appears that such remedies would be ineffective or unreasonably prolonged.⁵¹¹

The Human Rights Committee established by the International Covenant on Civil and Political Rights ("the Covenant") is also an effective forum to accommodate the complaint of the Inuit. The Committee is empowered to perform adjudicative functions under Optional Protocol I ("Protocol"). The Protocol recognizes the right of an individual to file a petition.⁵¹² The Inuit may present their environmental human rights claims to the HRC. The Committee will decide whether the complaint or communication is admissible, and if they find it admissible, the committee will inform the state of the matter and will require the state to respond to the charges within six months.⁵¹³ The Committee will review the complaints and the state's response and will

⁵¹¹ Complaint Procedure, *supra* note 325.

⁵¹² *ICCPR OP I*, *supra* note 337 at art. 5.

⁵¹³ *Ibid.* at art. 4; see generally Malone & Pasternack, *supra* note 449.

communicate its findings to the parties.⁵¹⁴ Article 45 of the ICCPR requires the committee to provide the UN General Assembly with a summary of the findings in its annual report.”⁵¹⁵

The available remedies to the Inuit under the United Nations human rights system include the following; 1.) the HRC can propose interim measures to avoid the irreparable damage⁵¹⁶, the HRC can mandate state “parties to indicate in their reports what measures they have taken to give effect to the HRC's recommendations in cases in which the HRC has found the state to be in violation of the Protocol, particularly stressing the remedy that has been given to the victim.”⁵¹⁷ Essentially, under the United Nations human rights system, the human rights bodies may recommend to the states to take appropriate measures to remedy the violation.

5.5.4.2 Remedies Under the Inter-American Human Rights System

There are also remedies under the Inter-American human rights system. The Inter-American Commission on Human Rights (IACHR or Commission) or the Inter-American Court of Human Rights (IACtHR or Court) can provide remedies to the Inuit. The mandates, powers, and the requirements for bringing complaints to these bodies have been addressed earlier in this chapter. However, it bears mentioning that both the Commission and the Court can receive and consider individual complaints and petitions. One of the remedies they may provide is the issuance of “emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm.”⁵¹⁸

⁵¹⁴ *ICCPR OP I*, *supra* note 337 at art. 4.

⁵¹⁵ *ICCPR*, *supra* note 50 at art. 45; Malone & Pasternack, *supra* note 449 at 379.

⁵¹⁶ See *ICCPR OP I*, *supra* note 337 at art. 4(1).

⁵¹⁷ Malone & Pasternack, *supra* note 449 at 379; *ICCPR OP I*, *supra* note 337 at art. 4(2).

⁵¹⁸ Malone & Pasternack, *supra* note 449 at 379

The Inuit's case raises several violations of the rights guaranteed under the Inter-American human rights instruments. The Commission and the Court are empowered to assume jurisdiction on the Inuit's case against the United States because they have violated Inuit's rights guaranteed under the American Declaration of the Rights and Duties of Man by the United States of American, the Inter-American Commission on Human Rights, and several other relevant instruments.

The *Rules of Procedure* of the IACHR provide specific requirements for the admissibility of a petition.⁵¹⁹ These include: 1.) the accused state must have violated one of the rights established in the Inter-American human rights regime;⁵²⁰ (2) the petitioner must have exhausted domestic remedies,⁵²¹ and; (3) the complaint must not be subject to any other international procedure.⁵²² The first requirement has been addressed earlier. The Inuit's case discloses that the United States violated the Inuit's rights under the Inter-American human rights instruments and other international human rights instruments. However, the Inuit must demonstrate that they have exhausted domestic remedies. There are three exceptions to this rule:- "if access to the remedies under domestic law has been denied; if there has been an unwarranted delay in rendering a final judgment or, when "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated"." One of these exceptions is available to the Inuit. The Inuit may demonstrate that the domestic legislation within the United States does not afford due process of law for the protection of their right or rights that have been violated by the United States. They may also prove that the United States legal system does not

⁵¹⁹ *IA Commission Rules*, *supra* note 389 at arts. 30-37.

⁵²⁰ *Ibid.* at art. 24.

⁵²¹ *Ibid.* at art. 31.

⁵²² *Ibid.* at art. 33.

provide a sufficient remedy for the human rights violations suffered by the Inuit as a result of U.S. actions and omissions, which contributed to climate change.⁵²³

The available remedies under the Inter-American human rights system include, but are not limited to, the following:

1. As mentioned earlier, both the Commission and the Court may issue “emergency protective measures in favor of the Inuit⁵²⁴.”
2. The Court may declare that the breach of the rights be remedied, and may also declare that fair compensation be paid to the Inuit.⁵²⁵
3. The Commission is empowered to investigate the violation of rights and the injury suffered by the Inuit.
4. The Commission may declare the United States liable and responsible for the environmental degradation in the Arctic.
5. The Commission may recommend to the United States to take actions towards reducing its emissions of greenhouse gases.
6. The Commission or the Court may also mandate the United States to respect its responsibilities under international law – the principle of State Responsibility and the Principle of Precautionary Approach and Preventive Action.
7. The Commission or the Court may also provide whatever relief it deems necessary and appropriate in the Inuit’s circumstance.

⁵²³ The Inuit Petition, *supra* note 409 at 116.

⁵²⁴ *Ibid.*

⁵²⁵ See generally *American Convention*, *supra* note 114 at art. 64.

5.6 CONCLUSION

The increase in the adverse impacts of climate change on human rights has prompted an incredible number of climate change litigations all over the world. Litigants continue to devise creative approaches in linking human rights to environmental rights. This has brought about more innovative strategies in seeking environmental justice and has attracted global attention to recognizing that a right to a healthy environment is significant to ensuring the full enjoyments of fundamental human rights recognized in various international, regional, and national regimes.

For the Inuit, it is no longer in doubt that climate change has compromised the integrity of their ecosystem and also violated their human rights. Chapter two of this thesis has established the fundamental human rights and the environmental rights of the Indigenous people under international and domestic regimes that apply to Indigenous people in the Arctic. It also revealed the nexus between the human and environmental Rights of the Indigenous peoples. Chapter three has provided the evidence required to prove the effect of climate change on the ecosystem, culture and way of life of the Peoples of the Arctic. Chapter four has discussed current global regimes on climate change which appear not to provide effective mechanisms or platforms for the Inuit to seek redress to defend their ecosystem (environment), culture, and way of life due to its weak system of enforcement among others. However, chapter five has demonstrated that all hope is not lost for the Inuit and the Indigenous Peoples, in general. It has also demonstrated the Inuit's case against the United States. The Inuit may find the proper forum and an effective mechanism to seek redress in the United Nations human rights system as well as in the regional human rights system – the Inter-American human rights system. Remarkably, the adoption of the American Declaration on the Rights of Indigenous Peoples in 2016 by the General Assembly of the Organization of American States has given a brand-new audacity of hope in their clamour for legal redress to

defend their culture and way of life. The Declaration has now established a well-defined right to a healthy environment which is recognized within the Inter-American human rights system. However, there is now a need to integrate this justiciable right to a healthy environment into an international instrument that has universal coverage and also a binding effect. Essentially, creating a binding international regime expressly recognizing the right to a healthy environment with a strong mechanism of enforcement where States are held accountable for their actions and inactions in global efforts to reduce the global temperature and the distressing impacts of climate change. Furthermore, considering the fact that climate change is a global phenomenon which has now become a threat to human existence, it is recommended that an intentional act of any State which contributes to global warming or increases the emissions of greenhouse gases should be categorized as a crime against humanity.

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